SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1096.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

SIDNEY W. WINSLOW, EDWARD P. HURD, GEORGE W. BROWN, WILLIAM BARBOUR, AND ELMER P. HOWE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Caption	1	1
Indictment	1	1
First count	1	1
Second count	23	23
Third count	45	45
Demurrer of defendants Sidney W. Winslow, Edward P. Hurd, William Barbour, and Elmer P. Howe	49	49
Grounds of demurrer, first count:		
1, 2, 3, 4	49	49
5, 6, 7, 8, 9	50	50
10, 11, 12, 13, 14, 15	51	51
16, 17, 18, 19, 20	52	52
21, 22, 23, 24, 25	53	53
26, 27, 28, 29	54	54
30, 31, 32, 33, 34, 35	55	55
36, 37, 38, 39, 40, 41	56	56
Grounds of demurrer, second count:		
1, 2, 3, 4	57	57
5, 6, 7, 8, 9	58	58
10, 11, 12, 13, 14, 15	59	59
16, 17, 18, 19, 20, 21	60	60
22, 23, 24, 25, 26, 27	61	61
28, 29, 30, 31, 32	62	62
33, 34, 35	63	63
Grounds of demurrer, third count:		
1	63	63
2, 3, 4, 5, 6, 7	64	64
8, 9, 10, 11, 12	65	65
13, 14, 15, 16, 17, 18, 19	66	66

40724—12——1

	Original.	Print.
Joinder on demurrer	67	67
Joinder of George W. Brown in the demurrer of other defendants	68	68
Joinder on demurrer	68	68
Writ of error	68a	69
Return of district court on writ of error	68b	69
Court and title of cause	69	70
Indictment filed	69	70
Demurrer of defendants Sidney W. Winslow, Edward P. Hurd, William Barbour, and Elmer P. Howe filed	69	70
Joinder on demurrer filed	70	71
Joinder of George W. Brown in the demurrer of other defendants filed	70	71
Joinder on demurrer filed	70	71
Judgment on demurrer	71	71
Bill of exceptions of the United States	71	72
Opinion of the court, March 2, 1912	73	72
Opinion filed	96	96
Petition of the United States for a writ of error and allowance	96	96
Assignment of errors	97	96
Citation on writ of error	99	97
Officer's return on citation on writ of error	100	98
Clerk's certificate	101	98

District Court of the United States,

DISTRICT OF MASSACHUSETTS.

No. 113, Criminal Docket.

THE UNITED STATES

v.

SIDNEY W. WINSLOW ET AL.

INDICTMENT.

[Filed in Circuit Court September 19, 1911.]

FIRST COUNT. The grand jurors for the United States of America impaneled and sworn in the Circuit Court of the United States for the District of Massachusetts at the February Term thereof in the year nineteen hundred and eleven, and inquiring for that district, upon their oath present, that for twenty-five years last past practically all of the shoes worn by the people of the United States have been manufactured by the aid and use of several different kinds of machines, in this indictment hereafter referred to collectively as shoe machinery, for doing the several different kinds of work pertaining to such manufacture, a general description of which said shoe machinery by groups is as follows; that is to say:

Lasting Machines.— Machines in this group are designed and used for the purpose of lasting the uppers of shoes;

Welt-Sewing Machines and Outsole-Stitching Machines.— Machines in this group are designed and used for the purpose of sewing the seam which attaches the upper to the outsole of a turned shoe, and the seam which attaches the upper and welt to the insole of a welted shoe, and for sewing the welt of a welted shoe to its outsole;

Heeling Machines.— Machines in this group are designed and used for preparing and attaching the heels of shoes;

Metallic Fastening Machines.—Machines in this group are designed and used for the purpose of preparing and inserting metallic fastenings in shoes;

the variety of machines constituting each group being so great as to render it impracticable to set forth in this indictment a detailed description of each of said machines; that such shoes have been and are articles of absolute necessity, and such shoe machinery has been and is indispensable to the manufacture of such shoes in quantities sufficient to meet the demand for the same; that manufactories where such shoes have been so produced by the aid and use of such shoe machinery have come into existence at divers places in the United States most available to the consumers of such articles; so that at the present day there is a very large number, to wit, thirteen hundred, of manufacturing concerns, in this indictment hereafter referred to collectively as shoe manufacturers, which are maintaining such manufactories at the following among other places; to wit:

California

San Francisco

Colorado

Denver

Connecticut

South Norwalk

Delaware

Wilmington

Georgia

Atlanta

Illinois

Chicago	Dixon	Elgin
Freeport	Jerseyville	Murphysboro
Pontiac	Rockford	Springfield
Troy	Warsaw	

Indiana

Aurora	Evansville	Fort Wayne
Huntington	Marion	Mishawaka

Iowa

Davenport	Des Moines	Dubuque
Fort Dodge	Keokuk	Muscatine
Webster City		

Kansas

Wichita

Kentucky

Augusta	Frankfort	Louisville
Maysville		

Louisiana

Hammond	New Orleans

Maine

Auburn	Augusta	Bangor
Belfast	Calais	Freeport
Gardiner	Hallowell	Lewiston
Mechanic Falls	Monmouth	New Sharon
Norridgewock	North Anson	Norway
Portland	Richmond	Skowhegan
South Berwick	Springvale	Warren
Wilton	Yarmouthville	

Maryland

Baltimore

Massachusetts

Abington	Andover	Athol
Beverly	Boston	Bridgewater
Brockton	Brookfield	Cambridge
Campello	Chelsea	Cochituate
Conway	Danvers	East Pepperell
East Weymouth	Everett	Fall River
Fitchburg	Georgetown	Haverhill
Holbrook	Holliston	Hudson
Lawrence	Lowell	Lynn
Malden	Marblehead	Marlboro
Middleboro	Milford	Millis
Natick	New Bedford	Newburyport

North Abington	North Adams	North Brookfield
North Easton	North Grafton	North Reading
Oxford	Peabody	Pittsfield
Randolph	Raynham	Reading
Rockland	Rowley	Salem
South Braintree	Southbridge	South Framingham
South Weymouth	Spencer	Stoneham
Stoughton	Swampscott	Topsfield
Wakefield	Ward Hill	Ware
Webster	Westboro	West Newbury
Weymouth	Whitman	Worcester

Michigan

Athens	Belding	Coldwater
Detroit	Grand Rapids	Hillsdale
Holland	Manistee	Menominee
Otsego	Rockford	Ypsilanti

Minnesota

Duluth	Faribault	Minneapolis
Red Wing	Stillwater	St. Paul
Winona		

Missouri

Brookfield	Cape Girardeau	Columbia
De Soto	Hannibal	Hermann
Jefferson City	Kansas City	Kirksville
Louisiana	Mexico	Moberly
St. Charles	St. Joseph	St. Louis
Washington		

Nebraska

Columbus	Omaha	

New Hampshire

Claremont	Derry	Dover
East Candia	East Rochester	Epping
Exeter	Farmington	Hampstead
Keene	Kingston	Littleton
Manchester	Milton	Nashua

Newport	Newton	North Weare
Northwood	Pittsfield	Portsmouth
Raymond	Rochester	Salem
Seabook	Somersworth	South Danville

New Jersey

Beverly	Burlington	Camden
Delanco	Hammonton	Hightstown
Lumberton	Mt. Holly	Newark
New Brunswick	Newton	Riverside
Trenton	Vineland	

New York

Albany	Auburn	Batavia
Binghamton	Brockport	Brooklyn
Buffalo	Castleton	Cortland
Croghan	Dansville	Dolgeville
Endicott	Horseheads	Jamestown
Lestershire	Lindenhurst, L. I.	Little Falls
New York	Nyack	Ossining
Penn Yan	Pleasantville	Poughkeepsie
Rochester	Stillville	Syracuse
Unadilla		

North Carolina

Elkin	High Point	Winston-Salem

Ohio

Ashland	Bethel	Chillicothe
Cincinnati	Cleveland	Columbus
Findlay	Franklin	Ironton
Lancaster	Mansfield	Marion
Minster	Portsmouth	Ripley
Springfield	Washington C. H.	Xenia

Oregon

Willamette Falls

Pennsylvania

Adamsdale	Akron	Allentown
Annville	Ashley	Birdsboro

Carlisle	Catawissa	Chambersburg
Columbia	Coopersburg	Dalmatia
Denver	Elizabethtown	Ferndale
Halifax	Hanover	Harrisburg
Holmes	Honesdale	Hummelstown
Kutztown	Landingville	Lebanon
Letitz	Macungie	Middletown
Millersburg	New Oxford	Orangeville
Orwigsburg	Ottsville	Palmyra
Philadelphia	Plymouth	Pottsville
Quakertown	Quarryville	Reading
Richlandtown	Schuylkill Haven	Selins Grove
Somerset	Watsontown	Wilkesbarre
Williamsport	York	

Rhode Island

Providence

Tennessee

Memphis	Nashville	

Texas

Dallas	Houston	Nocona

Utah

Salt Lake City

Vermont

Windsor

Virginia

Alexandria	Fredericksburg	Lynchburg
Richmond		

Washington

Seattle	Tacoma	

West Virginia

Huntington	Parkersburg	

Wisconsin

Beaver Dam	Beloit	Berlin
Cedarburg	Chippewa Falls	Eau Clair

Janesville	Jefferson	La Crosse
Madison	Milwaukee	Neenah
Racine	St. Cloud	Sheboygan
Sparta	Stoughton	Watertown
Waupun		

that while said grand jurors are unable to give a complete list of such shoe-manufacturing concerns, a partial list thereof, with their several places of manufacture, is as follows; to wit:

Buckingham & Hecht (Inc.) San Francisco, California
Cahn, Nickelsburg & Co. (Inc.) San Francisco, California
J. K. Orr Shoe Co. Atlanta, Georgia
Fargo & Phelps Chicago, Illinois
The Florsheim Shoe Co. Chicago, Illinois
Selz, Schwab & Co. (Inc.) Chicago, Illinois
J. P. Smith Shoe Co. Chicago, Illinois
Vogel Bros. Shoe Co. Louisville, Kentucky
Cushman-Hollis Co. Auburn, Maine
Dingley-Foss Shoe Co. Auburn, Maine
Foss, Packard & Co. Auburn, Maine
Lunn & Sweet Shoe Co. Auburn, Maine
Wise & Cooper Co. Auburn, Maine
Trimble Bros. & Co. Calais, Maine
R. P. Hazz[illegible] Co. Gardiner, Maine
National S[illegible]makers (Inc.) Lewiston, Maine.
A. H. Co[illegible]y & Co. Baltimore, Maryland
N. Hess & Bro. Baltimore, Maryland
C. H. Alden Co. Abington, Massachusetts
M. N. Arnold Co. North Abington, Massachusetts
Lewis A. Crossett Co. North Abington, Massachusetts
J. H. Baker & Co. Beverly, Massachusetts
Bray & Stanley Beverly, Massachusetts
J. W. Carter Shoe Co. Beverly, Massachusetts
Millett, Woodbury & Co. Beverly, Massachusetts
Woodbury Shoe Co. Beverly, Massachusetts
Rice & Hutchins (Inc.) Boston, Massachusetts

Slater & Morrill (Inc.) South Braintree, Massachusetts.
Williams, Kneeland Co. South Braintree, Massachusetts
Thos. G. Plant Co. Boston, Massachusetts
W. H. McElwain Co. Boston, Massachusetts
T. D. Barry Co. Brockton, Massachusetts
Brockton Co-op. Boot & Shoe Co. Brockton, Massachusetts
Brockton Ideal Shoe Co. Brockton, Massachusetts
Churchill & Alden Co. Brockton, Massachusetts
Condon Bros. & Co. Brockton, Massachusetts
Thompson Bros. Brockton, Massachusetts
W. L. Douglas Shoe Co. Brockton, Massachusetts
Chas. A. Eaton Co. Brockton, Massachusetts
Fred F. Field Co. Brockton, Massachusetts
Field, Lumbert Co. Brockton, Massachusetts
Howard & Foster Co. Brockton, Massachusetts
Geo. E. Keith Co. Brockton, Massachusetts
Preston B. Keith Shoe Co. Brockton, Massachusetts
Kelly, Buckley Co. Brockton, Massachusetts
C. S. Marshall Co. Brockton, Massachusetts
J. M. O'Donnell & Co. Brockton, Massachusetts
M. A. Packard Co. Brockton, Massachusetts
Geo. H. Snow Co. Brockton, Massachusetts
Stacy, Adams Co. Brockton, Massachusetts
E. E. Taylor Co. Brockton, Massachusetts
Whitman & Keith Co. Brockton, Massachusetts
J. H. Cross & Co. (Inc.) Cambridge, Massachusetts
Bangor Shoe Mfg. Co. Bangor, Maine
A. W. Shaw, Corp'n (Inc.) Freeport, Maine
Lee Bros. Co. (Inc.) Athol, Massachusetts
E. F. Bell & Co. Beverly, Massachusetts
Commonwealth Shoe & Leather Co. (Inc.) Boston, Massachusetts
Bartels & Thelen Co. Chelsea, Massachusetts
A. G. Walton Co. Chelsea, Massachusetts
Clapp & Tapley Danvers, Massachusetts
C. W. Bennett & Co. (Inc.) Fitchburg, Massachusetts
F. W. Baker Georgetown, Massachusetts

Forbush Shoe Co. North Grafton, Massachusetts
E. Bottomley & Co. Haverhill, Massachusetts
Carleton & Hunt Haverhill, Massachusetts
Geo. F. Carleton & Co. Haverhill, Massachusetts
W. S. Chase & Sons (Inc.) Haverhill, Massachusetts
Chesley & Rugg Haverhill, Massachusetts
Emery & Marshall Haverhill, Massachusetts
Gale Shoe Mfg. Co. Haverhill, Massachusetts
Hazen B. Goodrich & Co. Haverhill, Massachusetts
Hilliard & Tabor Haverhill, Massachusetts
Geo. C. How Haverhill, Massachusetts
W. & V. O. Kimball Co. Haverhill, Massachusetts
Geo. B. Leavitt & Co. Haverhill, Massachusetts
The W. C. Lewis Shoe Co. Haverhill, Massachusetts
S. B. McNamara & Co. Haverhill, Massachusetts
A. A. Ordway & Co. (Inc.) Haverhill, Massachusetts
Perry & Malcolm Co. Haverhill, Massachusetts
F. F. Swett Haverhill, Massachusetts
Fred J. Thompson Haverhill, Massachusetts
Wentworth-Swett Co. Haverhill, Massachusetts
J. H. Winchell & Co. (Inc.) Haverhill, Massachusetts
C. M. Brett Co. Hudson, Massachusetts
F. Brigham & Gregory Co. Hudson, Massachusetts
Fuller, Chandler, Patten Co. Hudson, Massachusetts
L. T. Jefts Co. Hudson, Massachusetts
Alfred Kimball Shoe Co. Lawrence, Massachusetts
A. J. Foster Lowell, Massachusetts
John Pilling Shoe Co. Lowell, Massachusetts
L. H. Spaulding Co. Lowell, Massachusetts
Stover & Bean Co. Lowell, Massachusetts
C. H. Aborn & Co. Lynn, Massachusetts
Allen, Foster, Willett Co. Lynn, Massachusetts
Chas. E. Blake & Co. Lynn, Massachusetts
Brophy Bros. Shoe Co. Lynn, Massachusetts
E. W. Burt Co. Lynn, Massachusetts
Cotter Shoe Co. Lynn, Massachusetts

A. M. Creighton Lynn, Massachusetts
D. A. Donavan Co. Lynn, Massachusetts
John R. Donovan Co. Lynn, Massachusetts
Eagle Shoe Mfg. Co. Lynn, Massachusetts
Faunce & Spinney Lynn, Massachusetts
A. Fisher & Son Lynn, Massachusetts
A. D. Fisher Lynn, Massachusetts
Goller Shoe Co. Lynn, Massachusetts
J. J. Grover's Sons Lynn, Massachusetts
Harney Bros. Lynn, Massachusetts
Geo. W. Herrick Shoe Co. Lynn, Massachusetts
Hoag & Walden (Inc.) Lynn, Massachusetts
Hoyt, Rowe & Co. Lynn, Massachusetts
V. K. & A. H. Jones Co. Lynn, Massachusetts
T. J. Kiely & Co. Lynn, Massachusetts
Mrs. A. R. King, Corporation Lynn, Massachusetts
Leonard Shoe Co. Lynn, Massachusetts
A. E. Little & Co. Lynn, Massachusetts
F. Logan Co. Lynn, Massachusetts
Lynch & Sherman (Inc.) Lynn, Massachusetts
Thos. H. Logan Co. Lynn, Massachusetts
J. I. Melanson & Bro. Lynn, Massachusetts
Mitchell-Caunt Co. Lynn, Massachusetts
Benj. H. Newhall Lynn, Massachusetts
Jas. Phelan & Sons Lynn, Massachusetts
Randall-Adams Co. Lynn, Massachusetts
Rickard-Gregory Shoe Co. Lynn, Massachusetts
Seymour & Jackson Co. Lynn, Massachusetts
Aaron F. Smith Co. Lynn, Massachusetts
J. B. Thomas & Tarr Lynn, Massachusetts
Tufts & Friedman Lynn, Massachusetts
J. L. Walker & Co. Lynn, Massachusetts
Watson Shoe Co. Lynn, Massachusetts
Williams, Clark & Co. Lynn, Massachusetts
Mark J. Worthley Lynn, Massachusetts
Humphrey & Paine Marblehead, Massachusetts

John Lancy, Jr. Marblehead, Massachusetts
John A. Frye Shoe Co. Marlboro, Massachusetts
S. H. Howe Shoe Co. Marlboro, Massachusetts
Keith & Pratt Middleboro, Massachusetts
Leonard & Barrows Middleboro, Massachusetts
Leonard, Shaw & Dean Middleboro, Massachusetts
Huckins & Temple Co. Milford, Massachusetts
Milford Shoe Co. Milford, Massachusetts
Brennan Boot & Shoe Co. Natick, Massachusetts
Walter L. Felch & Co. Natick, Massachusetts
Wm. F. Pfeiffer & Co. Natick, Massachusetts
Bliss & Perry Co. Newburyport, Massachusetts
Burley & Stevens (Inc.) Newburyport, Massachusetts
B. E. Cole & Co., Newburyport, Massachusetts
Geo. A. Learned Co. Newburyport, Massachusetts
Weber Bros. Shoe Co. North Adams, Massachusetts
H. H. Brown Co. North Brookfield, Massachusetts
A. L. Joslin Co. Oxford, Massachusetts
Richards & Brennan Co. Randolph, Massachusetts
Emerson Shoe Co. Rockland, Massachusetts
J. E. French & Co. Rockland, Massachusetts
Hurley Shoe Co. Rockland, Massachusetts
E. T. Wright & Co. Rockland, Massachusetts
Wm. C. Foster's Sons Rowley, Massachusetts
J. Brown & Sons Salem, Massachusetts
Cass & Daley Salem, Massachusetts
P. A. Field Shoe Co. Salem, Massachusetts
Daniel Glover & Son Salem, Massachusetts
Jos. T. Hopkins & Sons Salem, Massachusetts
Marston & Brooks Co. Salem, Massachusetts
Framingham Shoe Co. So. Framingham, Massachusetts
E. Jones & Co. (Inc.) Spencer, Massachusetts
Isaac Prouty & Co. (Inc.) Spencer, Massachusetts
P. Cogan & Son Stoneham, Massachusetts
T. H. Jones & Co. (Inc.) Stoneham, Massachusetts
Upham Bros. Co. Stoughton, Massachusetts

L. B. Evans Son Co. Wakefield, Massachusetts
A. J. Bates Co. Webster, Massachusetts
B. A. Corbin & Sons Co. Webster, Massachusetts
H. E. Brigham Westboro, Massachusetts
Alden, Walker & Wilde East Weymouth, Massachusetts
Edwin Clapp & Son (Inc.) East Weymouth, Massachusetts
The Stetson Shoe Co. South Weymouth, Massachusetts
Geo. Strong Shoe Co. East Weymouth, Massachusetts
Chas. Case Shoe Co. Worcester, Massachusetts
The Cummings Co. Worcester, Massachusetts
Heywood Boot & Shoe Co. Worcester, Massachusetts
J. E. & W. G. Wesson Worcester, Massachusetts
Regal Shoe Co. Boston, Massachusetts
Tappen Shoe Mfg. Co. (Inc.) Coldwater, Michigan
Menzies Shoe Co. Detroit, Michigan
The Pingree Co. Detroit, Michigan
Snedicor & Hathaway Co. Detroit, Michigan
Rindge, Kalmbach, Logie & Co. Grand Rapids, Michigan
Northern Shoe Co. Duluth, Michigan
North Star Shoe Co. Minneapolis, Minnesota
Foot, Schulze & Co. (Inc.) St. Paul, Minnesota
C. Gotzian & Co. (Inc.) St. Paul, Minnesota
O'Donnell Shoe Mfg. Co. St. Paul, Minnesota
Barton Bros. Kansas City, Missouri
Battreall Shoe Co. St. Joseph, Missouri
McCord, Donovan Shoe Co. St. Joseph, Missouri
Noyes-Norman Shoe Co. St. Joseph, Missouri
Brown Shoe Co. St. Louis, Missouri
Burrows, Jones & Dyer Shoe Co. St. Louis, Missouri
Carruthers-Jones Shoe Co. St. Louis, Missouri
Desnoyers Shoe Co. St. Louis, Missouri
F. Dittman Boot & Shoe Co. St. Louis, Missouri
Friedman-Shelby Shoe Co. St. Louis, Missouri
Hamilton-Brown Shoe Co. St. Louis, Missouri
Johansen Bros. Shoe Co. St. Louis, Missouri
John Meier Shoe Co. St. Louis, Missouri

Model Baby Shoe Co. (Inc.) St. Louis, Missouri
Peters Shoe Co. St. Louis, Missouri
Roberts, Johnson & Rand Shoe Co. St. Louis, Missouri
Wertheimer, Swarts Shoe Co. St. Louis, Missouri
C. E. Aldrich & Co. Farmington, New Hampshire
J. F. Cloutman & Co. Farmington, New Hampshire
F. E. Edgerly & Co. Farmington, New Hampshire
Farmington Shoe Mfg. Co. Farmington, New Hampshire
Thayer & Osborne Shoe Co. Farmington, New Hampshire
Monadnock Shoe Co. Keene, New Hampshire
G. P. Crafts Co. Manchester, New Hampshire
C. E. Green & Co. Manchester, New Hampshire
Willard H. Griffin Manchester, New Hampshire
F. M. Hoyt Shoe Co. Manchester, New Hampshire
Kimball Bros. Shoe Co. Manchester, New Hampshire
H. B. Reed & Co. Manchester, New Hampshire
Estabrook-Anderson Shoe Co. Nashua, New Hampshire
Chase, Chamberlain & Co. Raymond, New Hampshire
Linscott, Tyler, Wilson Co. Rochester, New Hampshire
N. B. Thayer & Co. East Rochester, New Hampshire
E. G. & E. Wallace Rochester, New Hampshire
Isaac Ferris, Jr. Co. Camden, New Jersey
Jas. A. Barrister Co. Newark, New Jersey
Thos. Cort (Inc.) Newark, New Jersey
Felter & Co. Newark, New Jersey
Johnston & Murphy Newark, New Jersey
Dunn & McCarthy (Inc.) Auburn, New York
Geo. Baker & Sons Brooklyn, New York
Geo. W. Baker Shoe Co. Brooklyn, New York
Brennan & White Brooklyn, New York
Edwin C. Burt Co. Brooklyn, New York
J. & T. Cousins Brooklyn, New York
John Cramer & Son Brooklyn, New York
Robt. Dix Shoe Mfg. Co. Brooklyn, New York
John Ennis Brooklyn, New York
Griffin-White Shoe Co. Brooklyn, New York

Hanan & Son Brooklyn, New York
J. J. Latteman Shoe Mfg. Co. Brooklyn, New York
Chas. W. Strohbeck Brooklyn, New York
Thomas & Company Brooklyn, New York
S. Waterbury & Son (Inc.) Brooklyn, New York
S. Weil & Co. (Inc.) Brooklyn, New York
Wichert & Gardiner (Inc.) Brooklyn, New York
John Ebberts Shoe Co. Buffalo, New York
John Strootman Shoe Co. Buffalo, New York
D. Armstrong & Co. (Inc.) Rochester, New York
Dugan & Hudson Co. Rochester, New York
C. P. Ford & Co. (Inc.) Rochester, New York
John Kelly (Inc.) Rochester, New York
Piehler Shoe Co. (Inc.) Rochester, New York
E. P. Reed & Co. (Inc.) Rochester, New York
Sherwood Shoe Co. Rochester, New York
Fred S. Todd Co. Rochester, New York
Utz & Dunn Rochester, New York
Venor & Co. Rochester, New York
Wright, Peters & Co. (Inc.) Rochester, New York
H. H. Gray's Son Syracuse, New York
A. E. Nettleton Co. Syracuse, New York
Syracuse Shoe Mfg Co. Syracuse, New York
The Bering Shoe Co. Cincinnati, Ohio
The Cahill Shoe Co. Cincinnati, Ohio
The Val Duttenhofer Sons' Co. Cincinnati, Ohio
The Columbia Shoe Mfg. Co. Cincinnati, Ohio
Helmers, Bettman & Co. Cincinnati, Ohio
The Helming-McKenzie Shoe Co. (Inc.) Cincinnati, Ohio
Hogan Shoe Co. (Inc.) Cincinnati, Ohio
Julian & Kokenge Co. Cincinnati, Ohio
The Krippendorf-Dittman Co. Cincinnati, Ohio
Krohn, Fechheimer & Co. Cincinnati, Ohio
The Manss Shoe Mfg. Co. Cincinnati, Ohio
L. V. Marks & Co. Cincinnati, Ohio
The Miller Shoe Mfg. Co. (Inc.) Cincinnati, Ohio

Plaut-Butler Co. Cincinnati, Ohio
Ramsfelder, Erlick Co. Cincinnati, Ohio
Roth Shoe Mfg. Co. Cincinnati, Ohio
The Sachs Shoe Mfg. Co. Cincinnati, Ohio
The Scheiffels Shoe Mfg. Co. Cincinnati, Ohio
Stern, Auer Co. Cincinnati, Ohio
P. Sullivan & Co. Cincinnati, Ohio
Wise, Shaw & Feder Co. (Inc.) Cincinnati, Ohio
Wolf Bros. & Co. (Inc.) Cincinnati, Ohio
S. L. Pierce & Co. Cleveland, Ohio
Schultz-Ruck-Delfs Shoe Co. Cleveland, Ohio
Bradford Shoe Co. Columbus, Ohio
C. & E. Shoe Co. Columbus, Ohio
H. C. Godman Co. Columbus, Ohio
The Riley Shoe Mfg. Co. Columbus, Ohio
G. Edwin Smith Shoe Co. Columbus, Ohio
Starner-Copeland Co. Columbus, Ohio
Wolfe Bros. Shoe Co. Columbus, Ohio
The Selby Shoe Co. (Inc.) Portsmouth, Ohio
Harrisburg Shoe Mfg. Co. Harrisburg, Pennsylvania
Crescent Shoe Co. Reading, Pennsylvania
Curtis & Jones Co. Reading, Pennsylvania
Craddock-Terry Co. Lynchburg, Virginia
The Washington Shoe Mfg. Co. Seattle, Washington
Robert Ackerman Shoe Co. Milwaukee, Wisconsin
Beals & Torrey Shoe Co. Milwaukee, Wisconsin
American Specialty Shoe Co. Milwaukee, Wisconsin
Bradley & Metcalf Co. Milwaukee, Wisconsin
Harsh & Edmonds Shoe Co. Milwaukee, Wisconsin
Kalt-Zimmers Mfg. Co. (Inc.) Milwaukee, Wisconsin
Luedke-Schaefer-Buttles Company, Milwaukee, Wisconsin
F. Mayer Boot & Shoe Co. Milwaukee, Wisconsin
The Rich Shoe Co. (Inc.) Milwaukee, Wisconsin
V. Schoenecker Boot & Shoe Co. Milwaukee, Wisconsin
A. H. Weinbrenner Co. Milwaukee, Wisconsin
Weyenberg Shoe Mfg. Co. Milwaukee, Wisconsin
The Wrensch & Herman Shoe Co. (Inc.) Milwaukee, Wisconsin

and that because the best of such machines have been and are manufactured under letters-patent of the United States by others, as hereinafter shown, and because all of such machines have been and are very expensive to manufacture, it has been, throughout said period of twenty-five years, impracticable for such shoe manufacturers to manufacture their own shoe machinery, and, for the foregoing reasons and for reasons hereinafter set forth, they have been under the necessity of obtaining the same principally from the defendants hereinafter named.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on, and for a considerable time before, the seventh day of February, in the year eighteen hundred and ninety-nine, Sidney W. Winslow, of Orleans, in said District of Massachusetts, and Edward P. Hurd and George W. Brown, both of Newton, in said District of Massachusetts, were directors of and large stockholders in the Consolidated & McKay Lasting Machine Company, a corporation theretofore organized under the laws of the State of Maine, and as such directors and stockholders were actively engaged in the management and control of the business affairs of said Consolidated & McKay Lasting Machine Company; James J. Storrow, of Boston, in said District of Massachusetts, was a director of and large stockholder in the McKay Shoe Machinery Company, a corporation theretofore organized under the laws of said State of Maine, and as such director and stockholder was actively engaged in the management and control of the business affairs of said McKay Shoe Machinery Company; and William Barbour, of New York City, New York, and Elmer P. Howe, of Boston aforesaid, were directors of and large stockholders in the Goodyear Shoe Machinery Company, a corporation theretofore organized under the laws of said State of Maine, and as such directors and stockholders were actively engaged in the management and control of the business affairs of said Goodyear Shoe Machinery Company; that said Sidney W. Winslow, Edward P. Hurd and George W. Brown, on said seventh day of February, in the year eighteen hundred and ninety-nine, were carrying on, under the name and through the instrumentality of said Consoli-

dated & McKay Lasting Machine Company, at Beverly, in said District of Massachusetts, the business of manufacturing such lasting machines, under letters-patent of the United States, to such an extent that they manufactured the larger portion, to wit, sixty per cent., of all such lasting machines manufactured in the United States; said James J. Storrow then was carrying on, under the name and through the instrumentality of said McKay Shoe Machinery Company, the business of manufacturing, at Winchester and Lawrence, in said District of Massachusetts, such heeling machines and such metallic fastening machines, under letters-patent of the United States, to such an extent that he manufactured the larger portion, to wit, seventy per cent., of all such heeling machines, and the larger portion, to wit, eighty per cent., of all such metallic fastening machines, manufactured in the United States; and said William Barbour and said Elmer P. Howe then were carrying on, under the name and through the instrumentality of said Goodyear Shoe Machinery Company, the business of manufacturing, at Boston aforesaid, such welt-sewing machines and outsole-stitching machines and such lasting machines, under letters-patent of the United States, to such an extent that they manufactured the larger portion, to wit, eighty per cent., of all such welt-sewing machines and outsole-stitching machines, and a large portion, to wit, ten per cent., of all such lasting machines, manufactured in the United States; that the letters-patent in this count of this indictment referred to were letters-patent applying in some cases to such shoe machines as a whole, and in other cases to attachments for, improvements upon and parts of such shoe machines; that said Sidney W. Winslow, Edward P. Hurd, George W. Brown, James J. Storrow, William Barbour, and Elmer P. Howe, hereinafter called defendants, in groups corresponding to the said three different corporations the business affairs of which they managed and controlled as aforesaid, in addition to manufacturing, at the places aforesaid, in the quantities aforesaid, and under letters-patent of the United States as aforesaid, the several kinds of shoe machinery aforesaid, shipped the shoe machinery so manufactured by them to the shoe manufacturers aforesaid at the said several places of

manufacture of said shoe manufacturers throughout the United States, in pursuance of contracts of sale and leasing thereof, and so, in such groups and as to such of said shoe manufacturers as were located in other States than Massachusetts, were then carrying on trade and commerce among the several States, within the meaning of the Act of Congress, approved July 2, 1890, and entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies"; that said groups of defendants then were separate from and independent of each other so far as their said several enterprises were concerned, and by reason of that fact each of said groups then carried on, as it should, its own portion of said interstate business, trade and commerce independently, and free from any self-restraint and from any control or restraint by or on account of the other groups, as to their choice of customers among said shoe manufacturers, as to the number of shoe machines they would sell or lease to such shoe manufacturers, as to the prices or rental they would exact and obtain from said shoe manufacturers for their shoe machinery, and as to the terms upon which they would sell or lease their shoe machinery to said shoe manufacturers, those being matters important in and vital to the carrying on of such interstate business, trade and commerce by said several groups respectively; that said interstate business, trade and commerce of said groups of defendants has ever since said seventh day of February, in the year eighteen hundred and ninety-nine, been carried on by said defendants, but in the manner and under the restraint hereinafter set forth, notwithstanding they should have continued to carry the same on free from that restraint; and that the variety of such several kinds of machines, and of said attachments for, improvements upon and parts of the same, used by them, was so great that it would unduly encumber the records of this court to set forth, and therefore the said grand jurors do not set forth, in this indictment, a detailed description of said letters-patent for the same.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants Sidney W. Winslow, Edward P. Hurd, George W. Brown, James J. Storrow, William Barbour

and Elmer P. Howe, continuously and at all times from said seventh day of February, in the year eighteen hundred and ninety-nine, to the day of the finding and presentation of this indictment, at the City of Boston, in said District of Massachusetts, each of said defendants then and there well knowing, as he then and there did well know, all the premises in this indictment aforesaid, and none of said defendants then and there being satisfied or contented with the enjoyment of the lawful monopolies and rights belonging to said groups of defendants under letters-patent of the United States as aforesaid, and each of said defendants then and there designing and intending unlawfully, unduly and unreasonably to extend and expand said monopolies and rights, and enhance the value thereof to said groups respectively, at the expense of said shoe manufacturers and the public generally, oppressively to use the same as a means of building up for each of said groups, over and above the power and control warranted and permitted by said letters-patent, an additional power over and control of the portion of said interstate business, trade and commerce so carried on by each of said groups, and to use that power and control, when so built up, for grasping and drawing to all of said groups in combination that portion thereof carried on, or which but for the conduct of said defendants in the premises might have been carried on, by others, for controlling and enhancing the prices of such shoe machinery, for discouraging and preventing others from inventing or manufacturing other devices and machines for doing the work done by the machines so by said defendants manufactured, sold and leased as aforesaid, and that done by parts of said machines, and from furnishing such other devices and machines to the shoe manufacturers aforesaid, in competition with the above-mentioned patented machines of said defendants, all to the great profit of themselves and injury to said shoe manufacturers and the public generally, unlawfully have engaged in a corrupt combination in undue, unreasonable and direct restraint of said interstate business, trade and commerce which, as aforesaid, since said day has been carried on by said defendants; that is to say, the combination, now here described, for unduly, unreasonably and directly

restraining, and which at all times since said seventh day of February, in the year eighteen hundred and ninety-nine, and therefore at all times during the three years next preceding the finding and presentation of this indictment, agreeably to said design and intent of said defendants, has in fact unduly, unreasonably and directly restrained, said interstate business, trade and commerce, in the manner and by the means now here set forth; to wit:

Said defendants, on said seventh day of February, in the year eighteen hundred and ninety-nine, at Boston aforesaid, in said District of Massachusetts, together organized, under the laws of the State of New Jersey, a corporation, to wit, the United Shoe Machinery Company, whose authorized preferred stock was $12,500,000.00, and whose authorized common stock was $12,500,000.00, and which was authorized by its charter among other things to manufacture, buy, sell, lease, operate and deal in and with all kinds of machinery, tools and implements, especially boot and shoe machinery, and everything in any way whatsoever connected with or useful in connection with the manufacture of boots, shoes and footwear, of which said United Shoe Machinery Company said defendant Sidney W. Winslow immediately became, and ever since has continued to be, president, director and member of the executive committee; said defendant Edward P. Hurd immediately became, and ever since has continued to be vice-president, assistant treasurer, director and member of the executive committee; said defendant George W. Brown immediately became, and ever since has continued to be, vice-president, director and member of the executive committee; said defendant James J. Storrow immediately became, and, down to December 8, 1909, continued to be, a director and member of the executive committee; said defendant William Barbour immediately became, and ever since has continued to be, vice-president, director and member of the executive committee; and said defendant Elmer P. Howe immediately became, and ever since has continued to be, a director and member of the executive committee; while all of said defendants have, since the organization of said United Shoe Machinery Company and down to the day

of the finding and presentation of this indictment, together continued in the active management and control of the business affairs of said United Shoe Machinery Company; and said groups of defendants thereupon severally turned over to said United Shoe Machinery Company, and caused that corporation to accept, take over and hold, the capital stocks and business of the three corporations in the names of which they had before carried on said business, trade and commerce as aforesaid, and said defendants, ever since, have together continued to manage, control and conduct, in the name and through the instrumentality of said United Shoe Machinery Company and in the names of divers other corporations and concerns subsidiary to said United Shoe Machinery Company, some of which have been from time to time organized, and others purchased, for that purpose, by said defendants, all the business so as aforesaid before independently carried on by said three groups of defendants, including the interstate business, trade and commerce aforesaid, the names and descriptions of which said subsidiary concerns are as follows; to wit: the United Shoe Machinery Corporation, a corporation of the State of New Jersey, the United Shoe Machinery Company, a corporation of the State of Maine, Booth Brothers Company, a corporation of the State of New York, and the United Shoe Machinery Company, a corporation of the State of Connecticut.

And said defendants, in so as last aforesaid carrying on with the design and intent aforesaid, the interstate business, trade and commerce so formerly independently carried on by them by groups as aforesaid, have ceased to manufacture any of such shoe machinery at Boston or Lawrence aforesaid, and have manufactured all of the same at Beverly aforesaid, in said District of Massachusetts; have ceased to sell any of such shoe machinery to said shoe manufacturers; have confined themselves to leasing the same to such shoe manufacturers upon written leases containing certain onerous and oppressive provisions not found in their former leases, that is to say, provisions whereby any of said shoe manufacturers leasing any of such kinds of machines have been bound to use in their manufacturing business only machines, of some or all of the sev-

eral other kinds aforesaid, furnished to them by said defendants, and were prohibited from using any machines, of any of those kinds, furnished or offered to them by other shoe-machinery manufacturers, and this upon penalty of having all machines leased to them by said defendants immediately reclaimed and taken away by said defendants and the leases thereof canceled, if they violated such prohibition; and have continually and persistently arbitrarily enforced said onerous and oppressive provisions, by all the means in their power, as against said shoe manufacturers, and made it their general policy and practice to refuse to furnish to them such shoe machinery, and to otherwise injure in every way they could, all shoe manufacturers who have failed to comply with the terms or spirit of said onerous and oppressive provisions in said leases.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that such organization by said defendants of said United Shoe Machinery Company, and such turning over, to said United Shoe Machinery Company, of the stocks and business of said corporations in the names and through the instrumentality of which they so as aforesaid formerly carried on in groups independent of each other their said former interstate business, trade and commerce, and such accepting, taking over and holding of the same by said United Shoe Machinery Company, of New Jersey, constituted, as said defendants then well knew they would and intended they should do, and the same have continued to be, a mere device for evading the provisions of said Act of Congress in that behalf; and that because said groups have ever been and now are, as said grand jurors, upon their said oath, charge the facts to be, independent of each other as aforesaid, and said defendants have been and are able to carry on said interstate business, trade and commerce in such groups without restraining themselves and without any of such groups being controlled or restrained by the others as to the matters aforesaid, and have been and are able to abolish and discontinue the use of said device and withdraw said stocks and business from said United Shoe Machinery Company, of New Jersey, such turning over to and acceptance and holding thereof by said United Shoe Machinery Company, of New Jersey, of said stocks and busi-

ness, under the circumstances aforesaid, was and is in legal effect a mere combining and placing of those stocks and said interstate business, trade and commerce of said several groups in trust in a manner made unlawful by said Act of Congress.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Sidney W. Winslow, Edward P. Hurd, George W. Brown, James J. Storrow, William Barbour and Elmer P. Howe, continuously and at all times during the three years next preceding the finding and presentation of this indictment, at Boston aforesaid, in said District of Massachusetts, in manner and form aforesaid, unlawfully have engaged in a combination in undue, unreasonable and direct restraint of trade and commerce among the several States; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SECOND COUNT. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that for twenty-five years last past practically all of the shoes worn by the people of the United States have been manufactured by the aid and use of several different kinds of machines, in this count of this indictment hereafter referred to collectively as shoe machinery, for doing the several different kinds of work pertaining to such manufacture, a general description of which said shoe machinery by groups is as follows; that is to say:

Lasting Machines. — Machines in this group are designed and used for the purpose of lasting the uppers of shoes.

Welt-Sewing and Outsole-Stitching Machines. — Machines in this group are designed and used for the purpose of sewing the seam which attaches the upper to the outsole of a turned shoe, and the seam which attaches the upper and welt to the insole of a welted shoe, and for sewing the welt of a welted shoe to its outsole.

Heeling Machines. — Machines in this group are designed and used for preparing and attaching the heels of shoes;

Metallic Fastening Machines. — Machines in this group are de-

signed and used for the purpose of preparing and inserting metallic fastenings in shoes;

the variety of machines constituting each group being so great as to render it impracticable to set forth in this indictment a detailed description of each of said machines; that such shoes have been and are articles of absolute necessity, and such shoe machinery has been and is indispensable to the manufacture of such shoes in quantities sufficient to meet the demand for the same; that manufactories where such shoes have been so produced by the aid and use of such shoe machinery have come into existence at divers places in the United States most available to the consumers of such articles, so that at the present day there is a very large number, to wit, thirteen hundred, of manufacturing concerns, in this indictment hereafter referred to collectively as shoe manufacturers, which are maintaining such manufactories at the following among other places; to wit:

California

San Francisco

Colorado

Denver

Connecticut

South Norwalk

Delaware

Wilmington

Georgia

Atlanta

Illinois

Chicago	Dixon	Elgin
Freeport	Jerseyville	Murphysboro
Pontiac	Rockford	Springfield
Troy	Warsaw	

Indiana

Aurora	Evansville	Fort Wayne
Huntington	Marion	Mishawaka

Iowa

Davenport	Des Moines	Dubuque
Fort Dodge	Keokuk	Muscatine
Webster City		

Kansas

Wichita

Kentucky

Augusta	Frankfort	Louisville
Maysville		

Louisiana

Hammond	New Orleans

Maine

Auburn	Augusta	Bangor
Belfast	Calais	Freeport
Gardiner	Hallowell	Lewiston
Mechanic Falls	Monmouth	New Sharon
Norridgewock	North Anson	Norway
Portland	Richmond	Skowhegan
South Berwick	Springvale	Warren
Wilton	Yarmouthville	

Maryland

Baltimore

Massachusetts

Abington	Andover	Athol
Beverly	Boston	Bridgewater
Brockton	Brookfield	Cambridge
Campello	Chelsea	Cochituate
Conway	Danvers	East Pepperell
East Weymouth	Everett	Fall River
Fitchburg	Georgetown	Haverhill
Holbrook	Holliston	Hudson
Lawrence	Lowell	Lynn
Malden	Marblehead	Marlboro
Middleboro	Milford	Millis
Natick	New Bedford	Newburyport

North Abington	North Adams	North Brookfield
North Easton	North Grafton	North Reading
Oxford	Peabody	Pittsfield
Randolph	Raynham	Reading
Rockland	Rowley	Salem
South Braintree	Southbridge	South Framingham
South Weymouth	Spencer	Stoneham
Stoughton	Swampscott	Topsfield
Wakefield	Ward Hill	Ware
Webster	Westboro	West Newbury
Weymouth	Whitman	Worcester

Michigan

Athens	Belding	Coldwater
Detroit	Grand Rapids	Hillsdale
Holland	Manistee	Menominee
Otsego	Rockford	Ypsilanti

Minnesota

Duluth	Faribault	Minneapolis
Red Wing	Stillwater	St. Paul
Winona		

Missouri

Brookfield	Cape Girardeau	Columbia
De Soto	Hannibal	Hermann
Jefferson City	Kansas City	Kirksville
Louisiana	Mexico	Moberly
St. Charles	St. Joseph	St. Louis
Washington		

Nebraska

Columbus	Omaha	

New Hampshire

Claremont	Derry	Dover
East Candia	East Rochester	Epping
Exeter	Farmington	Hampstead
Keene	Kingston	Littleton
Manchester	Milton	Nashua

Newport	Newton	North Weare
Northwood	Pittsfield	Portsmouth
Raymond	Rochester	Salem
Seabook	Somersworth	South Danville

New Jersey

Beverly	Burlington	Camden
Delanco	Hammonton	Hightstown
Lumberton	Mt. Holly	Newark
New Brunswick	Newton	Riverside
Trenton	Vineland	

New York

Albany	Auburn	Batavia
Binghamton	Brockport	Brooklyn
Buffalo	Castleton	Cortland
Croghan	Dansville	Dolgeville
Endicott	Horseheads	Jamestown
Lestershire	Lindenhurst, L. I.	Little Falls
New York	Nyack	Ossining
Penn Yan	Pleasantville	Poughkeepsie
Rochester	Stillville	Syracuse
Unadilla		

North Carolina

Elkin	High Point	Winston-Salem

Ohio

Ashland	Bethel	Chillicothe
Cincinnati	Cleveland	Columbus
Findlay	Franklin	Ironton
Lancaster	Mansfield	Marion
Minster	Portsmouth	Ripley
Springfield	Washington C. H.	Xenia

Oregon

Willamette Falls

Pennsylvania

Adamsdale	Akron	Allentown
Annville	Ashley	Birdsboro

Carlisle	Catawissa	Chambersburg
Columbia	Coopersburg	Dalmatia
Denver	Elizabethtown	Ferndale
Halifax	Hanover	Harrisburg
Holmes	Honesdale	Hummelstown
Kutztown	Landingville	Lebanon
Letitz	Macungie	Middletown
Millersburg	New Oxford	Orangeville
Orwigsburg	Ottsville	Palmyra
Philadelphia	Plymouth	Pottsville
Quakertown	Quarryville	Reading
Richlandtown	Schuylkill Haven	Selins Grove
Somerset	Watsontown	Wilkesbarre
Williamsport	York	

Rhode Island

Providence

Tennessee

Memphis	Nashville

Texas

Dallas	Houston	Nacona

Utah

Salt Lake City

Vermont

Windsor

Virginia

Alexandria	Fredericksburg	Lynchburg
Richmond		

Washington

Seattle	Tacoma

West Virginia

Huntington	Parkersburg

Wisconsin

Beaver Dam	Beloit	Berlin
Cedarburg	Chippewa Falls	Eau Clair

Janesville	Jefferson	La Crosse
Madison	Milwaukee	Neenah
Racine	St. Cloud	Sheboygan
Sparta	Stoughton	Watertown
Waupun		

that while said grand jurors are unable to give a complete list of the shoe-manufacturing concerns in this count referred to, a partial list thereof, with their several places of manufacture, is as follows; to wit:

Buckingham & Hecht (Inc.) San Francisco, California
Cahn, Nickelsburg & Co. (Inc.) San Francisco, California
J. K. Orr Shoe Co. Atlanta, Georgia
Fargo & Phelps Chicago, Illinois
The Florsheim Shoe Co. Chicago, Illinois
Selz, Schwab & Co. (Inc.) Chicago, Illinois
J. P. Smith Shoe Co. Chicago, Illinois
Vogel Bros. Shoe Co. Louisville, Kentucky
Cushman-Hollis Co. Auburn, Maine
Dingley-Foss Shoe Co. Auburn, Maine
Foss, Packard & Co. Auburn, Maine
Lunn & Sweet Shoe Co. Auburn, Maine
Wise & Cooper Co. Auburn, Maine
Trimble Bros. & Co. Calais, Maine
R. P. Hazzard Co. Gardiner, Maine
National Shoemakers (Inc.) Lewiston, Maine.
A. H. Colmary & Co. Baltimore, Maryland
N. Hess & Bro. Baltimore, Maryland
C. H. Alden Co. Abington, Massachusetts
M. N. Arnold Co. North Abington, Massachusetts
Lewis A. Crossett Co. North Abington, Massachusetts
J. H. Baker & Co. Beverly, Massachusetts
Bray & Stanley Beverly, Massachusetts
J. W. Carter Shoe Co. Beverly, Massachusetts
Millett, Woodbury & Co. Beverly, Massachusetts
Woodbury Shoe Co. Beverly, Massachusetts
Rice & Hutchins (Inc.) Boston, Massachusetts

Slater & Morrill (Inc.) South Braintree, Massachusetts.
Williams, Kneeland Co. South Braintree, Massachusetts
Thos. G. Plant Co. Boston, Massachusetts
W. H. McElwain Co. Boston, Massachusetts
T. D. Barry Co. Brockton, Massachusetts
Brockton Co-op. Boot & Shoe Co. Brockton, Massachusetts
Brockton Ideal Shoe Co. Brockton, Massachusetts
Churchill & Alden Co. Brockton, Massachusetts
Condon Bros. & Co. Brockton, Massachusetts
Thompson Bros. Brockton, Massachusetts
W. L. Douglas Shoe Co. Brockton, Massachusetts
Chas. A. Eaton Co. Brockton, Massachusetts
Fred F. Field Co. Brockton, Massachusetts
Field, Lumbert Co. Brockton, Massachusetts
Howard & Foster Co. Brockton, Massachusetts
Geo. E. Keith Co. Brockton, Massachusetts
Preston B. Keith Shoe Co. Brockton, Massachusetts
Kelly, Buckley Co. Brockton, Massachusetts
C. S. Marshall Co. Brockton, Massachusetts
J. M. O'Donnell & Co. Brockton, Massachusetts
M. A. Packard Co. Brockton, Massachusetts
Geo. H. Snow Co. Brockton, Massachusetts
Stacy, Adams Co. Brockton, Massachusetts
E. E. Taylor Co. Brockton, Massachusetts
Whitman & Keith Co. Brockton, Massachusetts
J. H. Cross & Co. (Inc.) Cambridge, Massachusetts
Bangor Shoe Mfg. Co. Bangor, Maine
A. W. Shaw, Corp'n (Inc.) Freeport, Maine
Lee Bros. Co. (Inc.) Athol, Massachusetts
E. F. Bell & Co. Beverly, Massachusetts
Commonwealth Shoe & Leather Co. (Inc.) Boston, Massachusetts
Bartels & Thelen Co. Chelsea, Massachusetts
A. G. Walton Co. Chelsea, Massachusetts
Clapp & Tapley Danvers, Massachusetts
C. W. Bennett & Co. (Inc.) Fitchburg, Massachusetts
F. W. Baker Georgetown, Massachusetts

Forbush Shoe Co. North Grafton, Massachusetts
E. Bottomley & Co. Haverhill, Massachusetts
Carleton & Hunt Haverhill, Massachusetts
Geo. F. Carleton & Co. Haverhill, Massachusetts
W. S. Chase & Sons (Inc.) Haverhill, Massachusetts
Chesley & Rugg Haverhill, Massachusetts
Emery & Marshall Haverhill, Massachusetts
Gale Shoe Mfg. Co. Haverhill, Massachusetts
Hazen B. Goodrich & Co. Haverhill, Massachusetts
Hilliard & Tabor Haverhill, Massachusetts
Geo. C. How Haverhill, Massachusetts
W. & V. O. Kimball Co. Haverhill, Massachusetts
Geo. B. Leavitt & Co. Haverhill, Massachusetts
The W. C. Lewis Shoe Co. Haverhill, Massachusetts
S. B. McNamara & Co. Haverhill, Massachusetts
A. A. Ordway & Co. (Inc.) Haverhill, Massachusetts
Perry & Malcolm Co. Haverhill, Massachusetts
F. F. Swett Haverhill, Massachusetts
Fred J. Thompson Haverhill, Massachusetts
Wentworth-Swett Co. Haverhill, Massachusetts
J. H. Winchell & Co. (Inc.) Haverhill, Massachusetts
C. M. Brett Co. Hudson, Massachusetts
F. Brigham & Gregory Co. Hudson, Massachusetts
Fuller, Chandler, Patten Co. Hudson, Massachusetts
L. T. Jefts Co. Hudson, Massachusetts
Alfred Kimball Shoe Co. Lawrence, Massachusetts
A. J. Foster Lowell, Massachusetts
John Pilling Shoe Co. Lowell, Massachusetts
L. H. Spaulding Co. Lowell, Massachusetts
Stover & Bean Co. Lowell, Massachusetts
C. H. Aborn & Co. Lynn, Massachusetts
Allen, Foster, Willett Co. Lynn, Massachusetts
Chas. E. Blake & Co. Lynn, Massachusetts
Brophy Bros. Shoe Co. Lynn, Massachusetts
E. W. Burt Co. Lynn, Massachusetts
Cotter Shoe Co. Lynn, Massachusetts

A. M. Creighton Lynn, Massachusetts
D. A. Donavan Co. Lynn, Massachusetts
John R. Donovan Co. Lynn, Massachusetts
Eagle Shoe Mfg. Co. Lynn, Massachusetts
Faunce & Spinney Lynn, Massachusetts
A. Fisher & Son Lynn, Massachusetts
A. D. Fisher Lynn, Massachusetts
Goller Shoe Co. Lynn, Massachusetts
J. J. Grover's Sons Lynn, Massachusetts
Harney Bros. Lynn, Massachusetts
Geo. W. Herrick Shoe Co. Lynn, Massachusetts
Hoag & Walden (Inc.) Lynn, Massachusetts
Hoyt, Rowe & Co. Lynn, Massachusetts
V. K. & A. H. Jones Co. Lynn, Massachusetts
T. J. Kiely & Co. Lynn, Massachusetts
Mrs. A. R. King, Corporation Lynn, Massachusetts
Leonard Shoe Co. Lynn, Massachusetts
A. E. Little & Co. Lynn, Massachusetts
F. Logan Co. Lynn, Massachusetts
Lynch & Sherman (Inc.) Lynn, Massachusetts
Thos. H. Logan Co. Lynn, Massachusetts
J. I. Melanson & Bro. Lynn, Massachusetts
Mitchell-Caunt Co. Lynn, Massachusetts
Benj. H. Newhall Lynn, Massachusetts
Jas. Phelan & Sons Lynn, Massachusetts
Randall-Adams Co. Lynn, Massachusetts
Richard-Gregory Shoe Co. Lynn, Massachusetts
Seymour & Jackson Co. Lynn, Massachusetts
Aaron F. Smith Co. Lynn, Massachusetts
J. B. Thomas & Tarr Lynn, Massachusetts
Tufts & Friedman Lynn, Massachusetts
J. L. Walker & Co. Lynn, Massachusetts
Watson Shoe Co. Lynn, Massachusetts
Williams, Clark & Co. Lynn, Massachusetts
Mark J. Worthley Lynn, Massachusetts
Humphrey & Paine Marblehead, Massachusetts

John Lancy, Jr. Marblehead, Massachusetts
John A. Frye Shoe Co. Marlboro, Massachusetts
S. H. Howe Shoe Co. Marlboro, Massachusetts
Keith & Pratt Middleboro, Massachusetts
Leonard & Barrows Middleboro, Massachusetts
Leonard, Shaw & Dean Middleboro, Massachusetts
Huckins & Temple Co. Milford, Massachusetts
Milford Shoe Co. Milford, Massachusetts
Brennan Boot & Shoe Co. Natick, Massachusetts
Walter L. Felch & Co. Natick, Massachusetts
Wm. F. Pfeiffer & Co. Natick, Massachusetts
Bliss & Perry Co. Newburyport, Massachusetts
Burley & Stevens (Inc.) Newburyport, Massachusetts
B. E. Cole & Co., Newburyport, Massachusetts
Geo. A. Learned Co. Newburyport, Massachusetts
Weber Bros. Shoe Co. North Adams, Massachusetts
H. H. Brown Co. North Brookfield, Massachusetts
A. L. Joslin Co. Oxford, Massachusetts
Richards & Brennan Co. Randolph, Massachusetts
Emerson Shoe Co. Rockland, Massachusetts
J. E. French & Co. Rockland, Massachusetts
Hurley Shoe Co. Rockland, Massachusetts
E. T. Wright & Co. Rockland, Massachusetts
Wm. C. Foster's Sons Rowley, Massachusetts
J. Brown & Sons Salem, Massachusetts
Cass & Daley Salem, Massachusetts
P. A. Field Shoe Co. Salem, Massachusetts
Daniel Glover & Son Salem, Massachusetts
Jos. T. Hopkins & Sons Salem, Massachusetts
Marston & Brooks Co. Salem, Massachusetts
Framingham Shoe Co. So. Framingham, Massachusetts
E. Jones & Co. (Inc.) Spencer, Massachusetts
Isaac Prouty & Co. (In.) Spencer, Massachusetts
P. Cogan & Son Stoneham, Massachusetts
T. H. Jones & Co. Stoughton, Massachusetts

L. B. Evans Son Co. Wakefield, Massachusetts
A. J. Bates Co. Webster, Massachusetts
B. A. Corbin & Sons Co. Webster, Massachusetts
H. E. Brigham Westboro, Massachusetts
Alden, Walker & Wilde East Weymouth, Massachusetts
Edwin Clapp & Son (Inc.) East Weymouth, Massachusetts
The Stetson Shoe Co. South Weymouth, Massachusetts
Geo. Strong Shoe Co. East Weymouth, Massachusetts
Chas. Case Shoe Co. Worcester, Massachusetts
The Cummings Co. Worcester, Massachusetts
Heywood Boot & Shoe Co. Worcester, Massachusetts
J. E. & W. G. Wesson Worcester, Massachusetts
Regal Shoe Co. Boston, Massachusetts
Tappan Shoe Mfg. Co. (Inc.) Coldwater, Michigan
Menzies Shoe Co. Detroit, Michigan
The Pingree Co. Detroit, Michigan
Snedicor & Hathaway Co. Detroit, Michigan
Rindge, Kalmbach, Logie & Co. Grand Rapids, Michigan
Northern Shoe Co. Minneapolis, Minnesota
Foot, Schulze & Co. (Inc.) St. Paul, Minnesota
C. Gotzian & Co. (Inc.) St. Paul, Minnesota
O'Donnell Shoe Mfg. Co. St. Paul, Minnesota
Barton Bros. Kansas City, Missouri
Battreall Shoe Co. St. Joseph, Missouri
McCord, Donovan Shoe Co. St. Joseph, Missouri
Noyes-Norman Shoe Co. St. Joseph, Missouri
Brown Shoe Co. St. Louis, Missouri
Burrows, Jones & Dyer Shoe Co. St. Louis, Missouri
Carruthers-Jones Shoe Co. St. Louis, Missouri
Desnoyers Shoe Co. St. Louis, Missouri
F. Dittman Boot & Shoe Co. St. Louis, Missouri
Friedman-Shelby Shoe Co. St. Louis, Missouri
Hamilton-Brown Shoe Co. St. Louis, Missouri
Johansen Bros. Shoe Co. St. Louis, Missouri
John Meier Shoe Co. St. Louis, Missouri

Model Baby Shoe Co. (Inc.) St. Louis, Missouri
Peters Shoe Co. St. Louis, Missouri
Roberts, Johnson & Rand Shoe Co. St. Louis, Missouri
Wertheimer, Swarts Shoe Co. St. Louis, Missouri
C. E. Aldrich & Co. Farmington, New Hampshire
J. F. Cloutman & Co. Farmington, New Hampshire
F. E. Edgerly & Co. Farmington, New Hampshire
Farmington Shoe Mfg. Co. Farmington, New Hampshire
Thayer & Osborne Shoe Co. Farmington, New Hampshire
Monadnock Shoe Co. Keene, New Hampshire
G. P. Crafts Co. Manchester, New Hampshire
C. E. Green & Co. Manchester, New Hampshire
Willard H. Griffin Manchester, New Hampshire
F. M. Hoyt Shoe Co. Manchester, New Hampshire
Kimball Bros. Shoe Co. Manchester, New Hampshire
H. B. Reed & Co. Manchester, New Hampshire
Estabrook-Anderson Shoe Co. Nashua, New Hampshire
Chase, Chamberlain & Co. Raymond, New Hampshire
Linscott, Tyler, Wilson Co. Rochester, New Hampshire
N. B. Thayer & Co. East Rochester, New Hampshire
E. G. & N. Wallace Rochester, New Hampshire
Isaac Ferris, Jr. Co. Camden, New Jersey
Jas. A. Barrister Co. Newark, New Jersey
Thos. Cort (Inc.) Newark, New Jersey
Felter & Co. Newark, New Jersey
Johnston & Murphy Newark, New Jersey
Dunn & McCarthy (Inc.) Auburn, New York
Geo. Baker & Sons Brooklyn, New York
Geo. W. Baker Shoe Co. Brooklyn, New York
Brennan & White Brooklyn, New York
Edwin C. Burt Co. Brooklyn, New York
J. & T. Cousins Brooklyn, New York
John Cramer & Son Brooklyn, New York
Robt. Dix Shoe Mfg. Co. Brooklyn, New York
John Ennis Brooklyn, New York
Griffin-White Shoe Co. Brooklyn, New York

Hanan & Son Brooklyn, New York
J. J. Latteman Shoe Mfg. Co. Brooklyn, New York
Chas. W. Strohbeck Brooklyn, New York
Thomas & Company Brooklyn, New York
S. Waterbury & Son (Inc.) Brooklyn, New York
S. Weil & Co. (Inc.) Brooklyn, New York
Wichert & Gardiner (Inc.) Brooklyn, New York
John Ebberts Shoe Co. Buffalo, New York
John Strootman Shoe Co. Buffalo, New York
D. Armstrong & Co. (Inc.) Rochester, New York
Dugan & Hudson Co. Rochester, New York
C. P. Ford & Co. (Inc.) Rochester, New York
John Kelly (Inc.) Rochester, New York
Piohlet Shoe Co. (Inc.) Rochester, New York
E. P. Reed & Co. (Inc.) Rochester, New York
Sherwood Shoe Co. Rochester, New York
Fred S. Todd Co. Rochester, New York
Utz & Dunn Rochester, New York
Venor & Co. Rochester, New York
Wright, Peters & Co. (Inc.) Rochester, New York
H. H. Gray's Son Syracuse, New York
A. E. Nettleton Co. Syracuse, New York
Syracuse Shoe Mfg Co. Syracuse, New York
The Bering Shoe Co. Cincinnati, Ohio
The Cahill Shoe Co. Cincinnati, Ohio
The Val Duttenhofer Sons' Co. Cincinnati, Ohio
The Columbia Shoe Mfg. Co. Cincinnati, Ohio
Helmers, Bettman & Co. Cincinnati, Ohio
The Helming-McKenzie Shoe Co. (Inc.) Cincinnati, Ohio
Hogan Shoe Co. (Inc.) Cincinnati, Ohio
Julian & Kokenge Co. Cincinnati, Ohio
The Krippendorf-Dittman Co. Cincinnati, Ohio
Krohn, Fechheimer & Co. Cincinnati, Ohio
The Manss Shoe Mfg. Co. Cincinnati, Ohio
L. V. Marks & Co. Cincinnati, Ohio
The Miller Shoe Mfg. Co. (Inc.) Cincinnati, Ohio

Plant-Butler Co. Cincinnati, Ohio
Ramsfelder, Erlick Co. Cincinnati, Ohio
Roth Shoe Mfg. Co. Cincinnati, Ohio
The Sachs Shoe Mfg. Co. Cincinnati, Ohio
The Scheiffels Shoe Mfg. Co. Cincinnati, Ohio
Stern, Auer Co. Cincinnati, Ohio
P. Sullivan & Co. Cincinnati, Ohio
Wise, Shaw & Feder Co. (Inc.) Cincinnati, Ohio
Wolf Bros. & Co. (Inc.) Cincinnati, Ohio
S. L. Pierce & Co. Cleveland, Ohio
Schultz-Ruck-Delfs Shoe Co. Cleveland, Ohio
Bradford Shoe Co. Columbus, Ohio
C. & E. Shoe Co. Columbus, Ohio
H. C. Godman Co. Columbus, Ohio
The Riley Shoe Mfg. Co. Columbus, Ohio
G. Edwin Smith Shoe Co. Columbus, Ohio
Wolfe Bros. Shoe Co. Columbus, Ohio
The Selby Shoe Co. (Inc.) Portsmouth, Ohio
Harrisburg Shoe Mfg. Co. Harrisburg, Pennsylvania
Crescent Shoe Co. Reading, Pennsylvania
Curtis & Jones Co. Reading, Pennsylvania
Craddock-Terry Co. Lynchburg, Virginia
The Washington Shoe Mfg. Co. Seattle, Washington
Robert Ackerman Shoe Co. Milwaukee, Wisconsin
Beals & Torrey Shoe Co. Milwaukee, Wisconsin
American Specialty Shoe Co. Milwaukee, Wisconsin
Bradley & Metcalf Co. Milwaukee, Wisconsin
Harsh & Edmonds Shoe Co. Milwaukee, Wisconsin
Kalt-Zimmers Mfg. Co. (Inc.) Milwaukee, Wisconsin
Luedke-Schaefer-Buttles Company, Milwaukee, Wisconsin
F. Mayer Boot & Shoe Co. Milwaukee, Wisconsin
The Rich Shoe Co. (Inc.) Milwaukee, Wisconsin
V. Schoenecker Boot & Shoe Co. Milwaukee, Wisconsin
A. N. Weinbrenner Co. Milwaukee, Wisconsin
Weyenberg Shoe Mfg. Co. Milwaukee, Wisconsin
The Wrensch & Herman Shoe Co. (Inc.) Milwaukee, Wisconsin

and that because the best of such machines have been and are manufactured under letters-patent of the United States by others, as hereinafter shown, and because all of such machines have been and are very expensive to manufacture, it has been, throughout said period of twenty-five years, impracticable for such shoe manufacturers to manufacture their own shoe machinery, and, for the foregoing reasons and for reasons hereinafter set forth, they have been under the necessity of obtaining the same principally from the defendants hereinafter named.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on, and for a considerable time before, the seventh day of February, in the year eighteen hundred and ninety-nine, Sidney W. Winslow, of Orleans, in said District of Massachusetts, and Edward P. Hurd and George W. Brown, both of Newton, in said District of Massachusetts, were directors of and large stockholders in the Consolidated & McKay Lasting Machine Company, a corporation theretofore organized under the laws of the State of Maine, and as such directors and stockholders were actively engaged in the management and control of the business affairs of said Consolidated & McKay Lasting Machine Company; James J. Storrow, of Boston, in said District of Massachusetts, was a director of and large stockholder in the McKay Shoe Machinery Company, a corporation theretofore organized under the laws of said State of Maine, and as such director and stockholder was actively engaged in the management and control of the business affairs of said McKay Shoe Machinery Company; and William Barbour, of New York City, New York, and Elmer P. Howe, of Boston aforesaid, were directors of and large stockholders in the Goodyear Shoe Machinery Company, a corporation theretofore organized under the laws of said State of Maine, and as such directors and stockholders were actively engaged in the management and control of the business affairs of said Goodyear Shoe Machinery Company; that said Sidney W. Winslow, Edward P. Hurd and George W. Brown, on said seventh day of February, in the year eighteen hundred and ninety-nine, were carrying on, under the name and through the instrumentality of said Consoli-

dated & McKay Lasting Machine Company, at Beverly, in said District of Massachusetts, the business of manufacturing such lasting machines, under letters-patent of the United States, to such an extent that they manufactured the larger portion, to wit, sixty per cent., of all such lasting machines manufactured in the United States; said James J. Storrow then was carrying on, under the name and through the instrumentality of said McKay Shoe Machinery Company, the business of manufacturing, at Winchester and Lawrence, in said District of Massachusetts, such heeling machines and such metallic fastening machines, under letters-patent of the United States, to such an extent that he manufactured the larger portion, to wit, seventy per cent., of all such heeling machines, and the larger portion, to wit, eighty per cent., of all such metallic fastening machines, manufactured in the United States; and said William Barbour and said Elmer P. Howe then were carrying on, under the name and through the instrumentality of said Goodyear Shoe Machinery Company, the business of manufacturing, at Boston aforesaid, such welt-sewing machines and outsole-stitching machines and such lasting machines, under letters-patent of the United States, to such an extent that they manufactured the larger portion, to wit, eighty per cent., of all such welt-sewing machines and outsole-stitching machines, and a large portion, to wit, ten per cent., of all such lasting machines, manufactured in the United States; that the letters-patent in this count referred to were letters-patent applying in some cases to such shoe machines as a whole, and in other cases to attachments for, improvements upon and parts of such shoe machines; that said Sidney W. Winslow, Edward P. Hurd, George W. Brown, James J. Storrow, William Barbour and Elmer P. Howe, hereinafter called defendants, in groups corresponding to the said three different corporations the business affairs of which they managed and controlled as in this count aforesaid, in addition to manufacturing, at the places aforesaid, in the quantities aforesaid, and under letters-patent of the United States as aforesaid, the several kinds of shoe machinery in this count aforesaid, shipped the shoe machinery so manufactured by them to the shoe manufacturers throughout the United States, in

pursuance of contracts of sale and leasing thereof, and so, in such groups and as to such of said shoe manufacturers as were located in other States than Massachusetts, were then carrying on trade and commerce among the several States, within the meaning of the Act of Congress, approved July 2, 1890, and entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies"; that said shoe manufacturers located in other States than Massachusetts then were, by reason of the facts in this count of this indictment above set forth, and in and by so obtaining such shoe machinery from said defendants, and from others, likewise carrying on trade and commerce among the several States with said defendants and others, within the meaning of said Act of Congress; that said groups of defendants then were separate from and independent of each other so far as their said several enterprises were concerned, and by reason of that fact each of said groups then carried on, as it should, its own portion of said interstate business, trade and commerce independently, and free from any self-restraint and from any control or restraint by or on account of the other groups, as to their choice of customers among said shoe manufacturers, as to the number of shoe machines they would sell or lease to such shoe manufacturers, as to the prices or rental they would exact and obtain from said shoe manufacturers for their shoe machinery, and as to the terms upon which they would sell or lease their shoe machinery to said shoe manufacturers, those being matters important in and vital to the carrying on of such interstate business, trade and commerce by said several groups respectively; that said interstate business, trade and commerce of said groups of defendants has ever since said seventh day of February, in the year eighteen hundred and ninety-nine, been carried on by said defendants, but in the manner and under the restraint hereinafter set forth, notwithstanding they should have continued to carry the same on free from that restraint; and that the variety of such several kinds of machines, and of said attachments for, improvements upon and parts of the same, used by them, was so great that it would unduly encumber the records of this court to set forth, and therefore the said grand jurors do not set forth, in

this indictment, a detailed description of said letters-patent for the same.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants Sidney W. Winslow, Edward P. Hurd, George W. Brown, James J. Storrow, William Barbour and Elmer P. Howe, continuously and at all times from said seventh day of February, in the year eighteen hundred and ninety-nine, to the day of the finding and presentation of this indictment, at the City of Boston, in said District of Massachusetts, each of said defendants then and there well knowing, as he then and there did well know, all the premises in this count of this indictment aforesaid, and none of said defendants then and there being satisfied or contented with the enjoyment of the lawful monopolies and rights belonging to said groups of defendants under letters-patent of the United States as in this count aforesaid, and each of said defendants then and there designing and intending unlawfully, unduly and unreasonably to extend and expand said monopolies and rights, and enhance the value thereof to said groups respectively, at the expense of said shoe manufacturers oppressively to use the same as a means of building up for each of said groups, over and above the power and control warranted and permitted by said letters-patent, an additional power over and control of the portion of said interstate business, trade and commerce so carried on by each of said groups, and to use that power and control, when so built up, for grasping and drawing to all of said groups in combination that portion thereof carried on, or which but for the conduct of said defendants in the premises might have been carried on, by others, for controlling and enhancing the prices of such shoe machinery, for discouraging and preventing others from inventing or manufacturing other devices and machines for doing the work done by the machines so by said defendants manufactured, sold and leased as aforesaid, and that done by parts of said machines, and from furnishing such other devices and machines to the shoe manufacturers aforesaid, in competition with the above-mentioned patented machines of said defendants, all to the great profit of themselves and injury of said shoe manufacturers, unlaw-

fully have engaged in a corrupt conspiracy in undue, unreasonable, direct and oppressive restraint of said interstate business, trade and commerce which, as aforesaid, since said day has been carried on by said shoe manufacturers; that is to say, the conspiracy, now here described, for unduly, unreasonably, directly and oppressively restraining, and which at all times since said seventh day of February, in the year eighteen hundred and ninety-nine, and therefore at all times during the three years next preceding the finding and presentation of this indictment, agreeably to said design and intent of said defendants, has in fact unduly, unreasonably, directly and oppressively restrained, said interstate business, trade and commerce, of said manufacturers, in the manner and by the means now here set forth; to wit:

Said defendants, on said seventh day of February, in the year eighteen hundred and ninety-nine, at Boston aforesaid, in said District of Massachusetts, together organized, under the laws of the State of New Jersey, a corporation, to wit, the United Shoe Machinery Company, whose authorized preferred stock was $12,500,-000.00, and whose authorized common stock was $12,500,000.00, and which was authorized by its charter among other things to manufacture, buy, sell, lease, operate and deal in and with all kinds of machinery, tools and implements, especially boot and shoe machinery, and everything in any way whatsoever connected with or useful in connection with the manufacture of boots, shoes and footwear, of which said United Shoe Machinery Company said defendant Sidney W. Winslow immediately became, and ever since has continued to be, president, director and member of the executive committee; said defendant Edward P. Hurd immediately became, and ever since has continued to be vice-president, assistant treasurer, director and member of the executive committee; said defendant George W. Brown immediately became, and ever since has continued to be, vice-president, director and member of the executive committee; said defendant James J. Storrow immediately became, and, down to December 3, 1909, continued to be, a director and member of the executive committee; said defendant William Barbour immediately became, and ever since has continued to be,

vice-president, director and member of the executive committee; and said defendant Elmer P. Howe immediately became, and ever since has continued to be, a director and member of the executive committee; while all of said defendants have, since the organization of said United Shoe Machinery Company and down to the day of the finding and presentation of this indictment, together continued in the active management and control of the business affairs of said United Shoe Machinery Company; and said groups of defendants thereupon severally turned over to said United Shoe Machinery Company, and caused that corporation to accept, take over and hold, the capital stocks and business of the three corporations in the names of which they had before carried on said business, trade and commerce as aforesaid, and said defendants, ever since, have together continued to manage, control and conduct, in the name and through the instrumentality of said United Shoe Machinery Company and in the names of divers other corporations and concerns subsidiary to said United Shoe Machinery Company, some of which have been from time to time organized, and others purchased, for that purpose, by said defendants, all the business so as aforesaid before independently carried on by said three groups of defendants, including the interstate business, trade and commerce aforesaid, the names and descriptions of which said subsidiary concerns are as follows; to wit: the United Shoe Machinery Corporation, a corporation of the State of New Jersey, the United Shoe Machinery Company, a corporation of the State of Maine, Booth Brothers Company, a corporation of the State of New York, and the United Shoe Machinery Company, a corporation of the State of Connecticut.

And said defendants, in so as last aforesaid carrying on, with the design and intent aforesaid, the interstate business, trade and commerce so formerly independently carried on by them by groups as aforesaid, have ceased to manufacture any of such shoe machinery at Boston or Lawrence aforesaid, and have manufactured all of the same at Beverly aforesaid, in said District of Massachusetts; have ceased to sell any of such shoe machinery to said shoe manufacturers; have confined themselves to leasing the same to such

shoe manufacturers upon written leases containing certain onerous and oppressive provisions not found in their former leases, that is to say, provisions whereby any of said shoe manufacturers leasing any of such kinds of machines have been bound to use in their manufacturing business only machines, of some or all of the several other kinds aforesaid, furnished to them by said defendants, and were prohibited from using any machines, of any of those kinds, furnished or offered to them by other shoe-machinery manufacturers, and this upon penalty of having all machines leased to them by said defendants immediately reclaimed and taken away by said defendants and the leases thereof canceled, if they violated such prohibition; and have continually and persistently arbitrarily enforced said onerous and oppressive provisions, by all the means in their power, as against said shoe manufacturers, and made it their general policy and practice to refuse to furnish to them such shoe machinery, and to otherwise injure in every way they could, all shoe manufacturers who have failed to comply with the terms or spirit of said onerous and oppressive provisions in said leases.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that such organization by said defendants of said United Shoe Machinery Company, of New Jersey, and such turning over, to said United Shoe Machinery Company, of New Jersey, of the stock and business of said corporations in the names and through the instrumentality of which they so as aforesaid formerly carried on in groups independent of each other their said former interstate business, trade and commerce, and such accepting, taking over and holding of the same by said United Shoe Machinery Company, of New Jersey, constituted, as said defendants then well knew they would and intended they should do, and the same have continued to be, a mere device for evading the provisions of said Act of Congress in that behalf and covering up the unlawful conspiracy in this count mentioned; and that because said groups have ever been and now are, as said grand jurors, upon their said oath, charge the facts to be, independent of each other as aforesaid, and said defendants have been and are able to carry on said interstate business, trade and commerce in such groups without restraining them-

selves and without any of such groups being controlled or restrained by the others as to the matters aforesaid and for the purpose in this count aforesaid, and have been and are able to abolish and discontinue the use of said device and withdraw said stocks and business from said United Shoe Machinery Company, of New Jersey, such turning over to and acceptance and holding thereof by said United Shoe Machinery Company, of New Jersey, of said stocks and business, under the circumstances in this count aforesaid, and such oppressive conduct of said defendants towards said shoe manufacturers in consequence thereof, have in legal effect amounted to the engaging in an unlawful conspiracy in restraint of said interstate business, trade and commerce of said shoe manufacturers by said defendants.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Sidney W. Winslow, Edward P. Hurd, George W. Brown, James J. Storrow, William Barbour and Elmer P. Howe, continuously and at all times during the three years next preceding the finding and presentation of this indictment, at Boston aforesaid, in said District of Massachusetts, in manner and form in this count of this indictment aforesaid, unlawfully have engaged in a conspiracy in undue, unreasonable, direct and oppressive restraint of trade and commerce among the several States; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRD COUNT. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Sidney W. Winslow, Edward P. Hurd, George W. Brown, James J. Storrow, William Barbour and Elmer P. Howe, hereinafter called defendants, continuously and at all times during the period of time from said seventh day of February, in the year eighteen hundred and ninety-nine, to the day of the finding and presentation of this indictment, and therefore continuously and at all times during the three years next preceding such finding and presentation, at Boston aforesaid, in said District of Massachusetts, unlawfully have knowingly monopolized a part of the trade and commerce among the several States of the

United States, that is to say, that part of such trade and commerce which has pertained to the furnishing to shoe manufacturers throughout the United States of shoe-manufacturing machinery of the several kinds described and referred to in the first and second counts of this indictment; that such monopolizing has been accomplished by said defendants by their knowingly engaging, continuously and at all times during said period of time, and under the circumstances and conditions in said first and second counts set forth with reference to said trade and commerce and the subjects thereof (the allegations of said first and second counts in that behalf, including the allegations as to knowledge, intent and design on the part of said defendants, and as to methods adopted and used by them, being by reference incorporated into this count of this indictment as fully as if herein repeated), in the unlawful combination in said first count described and in the unlawful conspiracy in said second count mentioned, and particularly by their using and arbitrarily enforcing the onerous and oppressive lease-provisions in said first and second counts referred to, and building up, by the means in those counts specified, as in said counts it is charged they designed and intended to and did build up, and as it is here charged they have built up, the power over and control of said part of said trade and commerce over and above the power and control warranted and permitted to them under the letters-patent of the United States in said counts mentioned, and using said power and control to draw to themselves and grasp practically all of said trade and commerce carried on by other concerns besides themselves, to control and enhance the prices of such shoe-manufacturing machinery, and to drive others out of said trade and commerce; and that a partial list of the names and locations of such other concerns whose portion of said trade and commerce said defendants have so drawn to themselves and grasped as aforesaid is as follows; to wit:

Corrugated Wire Fastening Company, Boston, Massachusetts;
P. A. Coupal & Company, Boston, Massachusetts;
Boston Shoe Tool Company, Boston, Massachusetts;
Edwin Theophilus Freeman, Boston, Massachusetts;

Albert G. Brewer, Hopkinton, Massachusetts;
Globe Shoe Tool Company, Boston, Massachusetts;
Sterling Stitch and Staple Company, Boston, Massachusetts;
Seaver Process Lasting Company, Boston, Massachusetts;
Boston Fast Color Eyelet Company, Boston, Massachusetts;
Enamel Eyelet Company, Boston, Massachusetts;
Swain Fuller Manufacturing Company, Boston, Massachusetts;
Continental Lasting Machine Company
Gordon Staple Lasting and Tacking Company, Boston, Massachusetts;
Oliver A. Miller, Brockton, Massachusetts;
Marlboro Awl and Needle Company, Marlboro, Massachusetts;
American Sole-Laying Machine Company, Boston, Massachusetts;
George A. Smith Machinery Company, Philadelphia, Pennsylvania;
George W. Emerson & Company, Lynn, Massachusetts;
W. W. Cross & Company, Incorporated, Brockton, Massachusetts;
The T. A. Norris Machine Company, Brockton, Massachusetts;
J. K. Krieg & Company, New York City, New York;
Joseph P. Curtis, Everett, Massachusetts;
Joseph W. Leary, Lynn, Massachusetts;
F. G. Farnham Brush Manufacturing Company, Honesdale, Pennsylvania;
Kimball & Hadley, Lynn, Massachusetts;
Arnold Machine & Supply Company, North Abington, Massachusetts;
Brockton Supply Company, Brockton, Massachusetts;
Metallic Heel and Counter Company, Boston, Massachusetts;
The Smith Lacing Machine Company, Boston, Massachusetts;
Booth Brothers, Rochester, New York;
Carver Cotton Gin Company, East Bridgewater, Massachusetts;
Richardson Shoe Machinery Company, Lynn, Massachusetts;
Ellis Lacer Company, Haverhill, Massachusetts;
The Wentworth Company, Cincinnati, Ohio;
Thomas G. Plant, Boston, Massachusetts;
Adam H. Prenzel, Halifax, Pennsylvania;
M. V. Bresnahan & Company, Lynn, Massachusetts;

Amazeen Machine Company, Boston, Massachusetts;
Boston Lasting Machine Company, Boston, Massachusetts;
Charles P. Stanbon operating under the name of Charles P. Stanbon & Company, Lynn, Massachusetts;

the names of the others being as yet unknown to said grand jurors; and a partial list of the names and locations of such other concerns which said defendants have driven out of said trade and commerce as aforesaid is as follows; to wit:

Goddu Sons Metal Fastening Company, Boston, Massachusetts;
Standard Shoe Machinery Company, Boston, Massachusetts, and New York City, New York;
Harry E. Cilley, Boston, Massachusetts;
The Duplessis Independent Shoe Machinery Company, Limited, Haverhill, Massachusetts;

the names of the others being as yet unknown to said grand jurors; Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

A True Bill.

LELAND A. WHITNEY,
Foreman of the Grand Jury.

ASA P. FRENCH,
United States Attorney for the District of Massachusetts;

OLIVER E. TAGAN,
Attorney, Department of Justice.

DISTRICT OF MASSACHUSETTS, Sept. 19, 1911.

Returned into the Court [Circuit] by the Grand Jurors and filed

CHARLES K. DARLING, *Clerk.*

DEMURRER OF DEFENDANTS SIDNEY W. WINSLOW, EDWARD P. HURD, WILLIAM BARBOUR AND ELMER P. HOWE.

[Filed in Circuit Court November 4, 1911.]

Each of the defendants demurs to each count of said indictment, and says that each count and the matters therein contained, in manner and form as the same are set forth, are not sufficient in law, and that he is not bound to answer the same; wherefore he prays judgment and that by the court he may be dismissed and discharged.

And each of the defendants, not waiving his right to file further grounds of demurrer if he shall so desire, but insisting upon said right and upon his right to avail himself of all grounds of objection under the above general demurrer, without filing any statement of the same, does further demur to the first count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because the matters and things charged in said count do not constitute any offence against the laws of the United States.

2. Because the provisions of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," are too vague, indefinite and uncertain to create and define an offence against the United States, and because there is no statute of the United States which makes it an offence to engage in the combination set forth in said count.

3. Because the provisions of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," are too vague, indefinite and uncertain to make the acts charged against the defendants in said count an offence against the United States.

4. Because said Act of Congress of July 2, 1890, declaring combinations in unreasonable or illegal restraint of interstate trade or commerce to be misdemeanors, is in violation of the Constitution of the United States, in that it delegates to others than Congress the duty of creating and defining offences against the United States

[Figures in parentheses in this demurrer are the page numbers referred to in this printed Record.]

and because there is no statute of the United States defining such unreasonable or illegal restraint.

5. Because the material allegation in said count, that the defendants have engaged in a combination in unreasonable restraint of interstate trade and commerce therein charged, is repugnant to the other material allegations in said count that the alleged restraint was exercised by one or more of the corporations therein referred to, and to the other material allegations in said count to the effect and in substance that the acts of the defendants therein set forth were committed as officers and directors of such corporations engaged in the management and control of their affairs.

6. Because the material allegations in said count, on pages 15 and 16 (16, 17) [typewritten pages 19, 20, 21] thereof, that the defendants, on, before and after the seventh day of February, 1899, were then carrying on trade and commerce among the several States within the meaning of said Act of Congress therein referred to, are repugnant to the other material allegations in said count to the effect and in substance that in carrying on such business they were acting as directors and stockholders of and in certain corporations in the management and control of the affairs of which they were actively engaged, and are also repugnant to other material allegations on page 22 (20, 21) [typewritten page 27] of said count to the effect and in substance that said business, trade and commerce was turned over by certain of said corporations to and was accepted, taken over and held by the said United Shoe Machinery Company mentioned in said count.

7. Because said count does not charge or describe with certainty sufficient for identification the combination in which it is charged that the defendants engaged.

8. Because said count does not charge with sufficient certainty and particularity that the alleged combination was in unreasonable or illegal restraint of interstate trade or commerce.

9. Because said count does not charge with sufficient certainty and particularity how or in what manner interstate trade or commerce was unreasonably or illegally restrained by said alleged combination.

10. Because said count does not set forth or charge with sufficient certainty and particularity that the defendants have, by organizing said United Shoe Machinery Company of New Jersey, therein referred to, engaged in any combination, nor that said company was, either by itself or in combination with others, a combination within the meaning of said Act of Congress.

11. Because said count does not charge with sufficient certainty and particularity that the alleged organization of said United Shoe Machinery Company of New Jersey therein referred to, illegally or unreasonably restrained interstate trade or commerce, or was, by itself or in combination with others, a combination in unreasonable or illegal restraint of interstate trade or commerce.

12. Because said count does not charge with sufficient certainty and particularity that the alleged acquisition of the capital stock, business and assets of the Consolidated & McKay Lasting Machine Company, the McKay Shoe Machinery Company and the Goodyear Shoe Machinery Company by said United Shoe Machinery Company of New Jersey, illegally or unreasonably restrained interstate trade or commerce or constituted or created a combination in unreasonable or illegal restraint of trade or commerce.

13. Because said count does not charge or set forth with sufficient certainty and particularity the circumstances and conditions nor the terms of the arrangement, agreement, contract or understanding under which it is claimed that the said group of defendants severally turned over to said United Shoe Machinery Company and caused that company to accept, take over and hold the capital stocks and business of said three corporations as alleged on page 22 (18) [typewritten page 27] of said count.

14. Because said count does not charge with sufficient certainty and particularity that, in what manner, or how, interstate trade or commerce was illegally or unreasonably restrained by the alleged acquisition referred to in the ground last assigned or how such alleged acquisition constituted or created a combination in unreasonable or illegal restraint of trade or commerce.

15. Because said count does not set forth with sufficient certainty and particularity, either by recital or in substance, the terms of said

alleged onerous and oppressive leases referred to in said count, on pages 23 and 24 (21, 22) [typewritten page 29] thereof, and because said count does not show how or in what manner such alleged leases were arbitrary and oppressive, nor the parties to each such lease nor the date on which or the place at which the same were entered into.

16. Because said count sets forth no offence in that the leasing of shoe machinery set forth in said count did not constitute interstate trade or commerce within the meaning of said Act of Congress of July 2, 1890.

17. Because said count does not charge that interstate commerce was or could be illegally or unreasonably restrained by the use of said alleged leases, and because it appears from the allegations in said count that said alleged leases did not unreasonably or illegally restrain, or create a monopoly of, interstate trade and commerce.

18. Because said count does not set forth with sufficient certainty and particularity how or in what way the defendants have injured the shoe manufacturers as alleged on the 24th page (21, 22) [typewritten page 29] of said count, nor that they have injured such shoe manufacturers by any act or conduct in unreasonable or illegal restraint of trade or commerce.

19. Because the material allegations in said count to the effect and in substance that the defendants have engaged in a combination in undue, unreasonable and direct restraint of interstate trade and commerce, in the manner and by the means therein set forth, are repugnant to other material allegations in said count that such manner and means therein referred to were duly authorized by Letters Patent of the United States and were not in unreasonable or illegal restraint of interstate trade or commerce.

20. Because the allegations in said count to the effect and in substance that the defendants are or were engaged in interstate commerce on, before and after February 7, 1899, are inconsistent with and repugnant to the other allegations in said count to the effect and in substance that the alleged commerce in which it is charged the defendants were so engaged was the selling and leasing of machinery covered by Letters Patent of the United States,

for as a matter of law unless and until released by the owner of the patent from the domain of his monopoly, patented articles are not articles of trade and commerce among the several States within the meaning of said Act of July 2, 1890, and the lessor or vendor thereof is not engaged in interstate commerce.

21. Because no offence under said Act of Congress of July 2, 1890, is set forth in this count, in that it appears that the business alleged to be that of said defendants was covered by Letters Patent of the United States, and as a matter of law the acts in relation to such business charged against the defendants in this count are therefore independent of and not embraced under or in conflict with the said Act.

22. Because the leases referred to in said count concern patented articles, and the defendants had the right to insert such provisions in said leases as are not in their very nature illegal or contrary to public policy, and said count does not charge that the terms or conditions of said leases as alleged were even contrary to public policy.

23. Because said count sets forth no offence in that the organization of the United Shoe Machinery Company and the accepting, taking over and holding of the capital stocks and business of the three corporations by such United Company as alleged is not a combination in restraint of the trade of the defendants who are alleged to have been large stockholders in the three companies formerly owning said stocks and business.

24. Because said count sets forth no offence in that the alleged turning over by the defendants to a new corporation which they are alleged to manage and control, was not a restraint of defendants' own trade.

25. Inasmuch as said count charges the defendants with a combination in restraint of defendants' own trade, it is inconsistent with and repugnant to said allegation to allege that the defendants confined themselves to leasing shoe machinery upon written leases containing the following provision, to wit, that shoe manufacturers should use only machines furnished by defendants, as such pro-

vision is clearly not in restraint of defendants' own trade, but is in promotion or expansion of defendants' own trade.

26. Because the allegation in said count in substance and to the effect that the defendants entered into a combination in restraint of defendants' own trade, is inconsistent with and repugnant to the allegation that the defendants confined themselves to leasing shoe machinery upon written leases containing the following provision, to wit, that shoe manufacturers were prohibited from using shoe machinery of any kind furnished or offered to them by any other shoe machinery manufacturers, as such provision is not in restraint of defendants' own trade, but in promotion or expansion of defendants' own trade.

27. Because the allegations on page 19 (19) [typewritten page 24] of said count to the effect and in substance that the defendants' intention was to extend and expand their monopolies and rights, is inconsistent with and repugnant to the other allegations in said first count that defendants engaged in combining to restrain their own trade, as such extension and expansion was not a restraint of defendants' own trade.

28. Because the allegations on pages 19 and 20 (19) [typewritten page 24] of said count to the effect and in substance that the defendants intended to build for each of said groups therein referred to, over and above the power and control warranted and permitted by said Letters Patent, an additional power over and control of the interstate business alleged to have been carried on by said defendants, are inconsistent with and repugnant to other allegations in said count that the defendants engaged in the combination to restrain their own trade, inasmuch as such building up would not be in restraint of defendants' own trade.

29. Because the allegations on page 20 (19, 20) [typewritten page 25] of said count to the effect and in substance that the defendants intended to use such alleged power when so built up for grasping and drawing to said groups business which others might otherwise have carried on, are inconsistent with and repugnant to the charge in said count that the defendants combined to restrain their own trade.

30. Because the allegations on page 20 (19, 20) [typewritten page 25] of said count in substance and to the effect that the defendants for discouraging and preventing others from inventing or manufacturing devices and machines entered into the alleged combination are inconsistent with and repugnant to the charge in said count that the defendants entered into such combination to restrain their own trade, as such alleged purposes only, if carried out, show a restraint of the trade of other people.

31. The allegation on page 25 (22) [typewritten page 30] of said count that said groups have ever been and now are independent of each other, charged as a fact by the Grand Jury, is inconsistent with and repugnant to a prior allegation that the defendants restrained their own trade by their own device, to wit, the United Shoe Machinery Company.

32. The allegation on page 25 (22) [typewritten page 30] of said count that said groups have ever been and now are independent of each other, charged as a matter of fact by the Grand Jury, is inconsistent with and repugnant to the prior allegation on page 22 (21) [typewritten page 28] of said count that the defendants have together, since the organization of the United Shoe Machinery Company, continued to manage, control and conduct all the business so as aforesaid before independently carried on by said three groups of defendants.

33. The allegations of said count are indefinite, uncertain and vague in that it does not appear how or that the defendants acquired said business of said three groups from said three groups, or that they had any pecuniary or financial interest in the United Shoe Machinery Company.

34. The allegation in said count that defendants are able to abolish and discontinue the use of said device and withdraw said stocks and business from said United Shoe Machinery Company is inconsistent with and repugnant to the prior allegation of accepting, taking over and holding the same by said United Shoe Machinery Company.

35. Said count sets forth no offence because if there is any

restraint of trade of the vendors by the organization of said United Company such restraint is only indirect and inappreciable.

36. Said count sets forth no offence in that the organization of the United Shoe Machinery Company and the accepting, taking over and holding by it of the stocks and business of the three other non-competing manufacturing and business corporations is not a direct restraint of interstate trade of three large stockholders of the one corporation, one large stockholder of the second corporation and two large stockholders of the third corporation so taken over. Such organization and taking over is not an unreasonable restraint of the interstate trade of said stockholders.

37. Said count sets forth no offence in that the organization of the United Shoe Machinery Company was simply the combining of companies engaged in manufacturing and leasing complementary and non-competing machines, and in no way restrained the interstate trade carried on by the defendants, but rather promoted the same.

38. Because said count does not charge that the alleged offence therein set forth was committed at any place within the jurisdiction of this court.

39. Because said count does not charge with sufficient certainty and particularity that the alleged offence therein set forth was committed at any place within the jurisdiction of this court, inasmuch as it does not charge with sufficient certainty and particularity that the acts of the defendants therein alleged to have constituted the combination charged were committed within the District of Massachusetts.

40. Said count is uncertain, indefinite and vague in that it is not alleged on page 17 (17, 18) [typewritten page 22] or elsewhere what contracts of sale defendants in their several groups ever made with the shoe manufacturers or the terms thereof, or what machines the said groups ever sold, and what the said groups leased, and such averment is necessary in connection with the averment on page 23 (21, 22) [typewritten page 29] that defendants have ceased to sell any of such shoe machinery to such shoe manufacturers.

41. The allegation on page 21 (20) [typewritten page 26] that the

defendants together, at Boston aforesaid in said District of Massachusetts, organized a corporation under the laws of New Jersey, to wit, the United Shoe Machinery Company, is repugnant in that as a matter of law a New Jersey corporation could not be organized in Massachusetts.

Wherefore each of the defendants prays judgment of said count and that by the court he may be dismissed and discharged.

Demurrer to Second Count.

And each of the defendants, not waiving his right to file further grounds of demurrer if he shall so desire, but insisting upon said right and upon his right to avail himself of all grounds of objection under the above general demurrer, without filing any statement of the same, does further demur to the second count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because the matters and things charged in said count do not constitute any offence against the laws of the United States.

2. Because the provisions of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," are too vague, indefinite and uncertain to create any offence against the United States, and because there is no statute of the United States which makes it an offence to engage in the conspiracy set forth in said count.

3. Because the provisions of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," are too vague, indefinite and uncertain to make the acts charged against the defendants in said count an offence against the United States.

4. Because the Act of Congress of July 2, 1890, declaring conspiracies in unreasonable or illegal restraint of interstate trade or commerce to be misdemeanors, is in violation of the Constitution of the United States, in that it delegates to others than Congress the duty of creating and defining offences against the United States, and because there is no statute of the United States defining such unreasonable or illegal restraint.

5. Because said count does not charge with sufficient certainty and particularity the terms and nature of the conspiracy therein alleged.

6. Because the material allegations in said count, that the defendants engaged in a conspiracy in undue, unreasonable, direct and oppressive restraint of interstate trade and commerce of said shoe manufacturers in the manner and by the means set forth in said count, are repugnant to the other material allegations in said count describing such manner and means, because such manner and means so described were not in direct, unreasonable or illegal restraint of such interstate trade or commerce of said shoe manufacturers.

7. Because the material allegations in said count, on pages 39, 40 and 41 (38, 39) [typewritten pages 49, 50, 51] thereof, that the defendants, on, before and after the seventh day of February, 1899, were then carrying on trade and commerce among the several States within the meaning of said Act of Congress therein referred to, are repugnant to the other material allegations in said count to the effect and in substance that in carrying on such business they were acting as directors and stockholders of certain corporations in the management and control of the affairs of which they were actively engaged, and are also repugnant to other material allegations on pages 47 and 48 (42, 43) [typewritten pages 57, 58] of said count that said business, trade and commerce was turned over by certain of said corporations to the said United Shoe Machinery Company mentioned in said count.

8. Because said count does not charge or set forth with sufficient certainty and particularity the circumstances and conditions nor the terms of the arrangement, agreement, contract or understanding under which it is claimed that the said group of defendants severally turned over to said United Shoe Machinery Company and caused that company to accept, take over and hold the capital stock and business of said three corporations as alleged on page 47 (42, 43) [typewritten page 57] of said count.

9. Because said count coes not charge with sufficient certainty and particularity that the alleged organization of said United Shoe

Machinery Company of New Jersey, therein referred to, illegally or unreasonably restrained interstate trade or commerce, or was, by itself or in combination with others, a combination in unreasonable or illegal restraint of interstate trade or commerce.

10. Because said count does not set forth or charge with sufficient certainty and particularity that the defendants have, by organizing said United Shoe Machinery Company of New Jersey, therein referred to, engaged in any combination, nor that said company was, either by itself or in combination with others, a combination within the meaning of said Act of Congress.

11. Because said count does not charge with sufficient certainty and particularity that the alleged acquisition of the capital stock, business and assets of the Consolidated & McKay Lasting Machine Company, the McKay Shoe Machinery Company and the Goodyear Shoe Machinery Company by said United Shoe Machinery Company of New Jersey, illegally or unreasonably restrained interstate trade or commerce.

12. Because said count does not charge with sufficient certainty that, in what manner or how, interstate trade or commerce was illegally or unreasonably restrained by the alleged acquisition referred to in the ground last assigned.

13. Because said count does not set forth with sufficient certainty and particularity, either by recital or in substance, the terms of said alleged onerous and oppressive leases referred to in said count and because said count does not show how or in what manner such leases or the provisions thereof were onerous and oppressive.

14. Because said count does not charge that interstate commerce was or could be illegally or unreasonably restrained by the use of said leases, and because it appears from the allegations in said count that said leases did not unreasonably or illegally restrain, or create a monopoly of, interstate commerce.

15. Because said count sets forth no offence in that the leasing of shoe machinery set forth in said count did not constitute interstate trade or commerce within the meaning of said Act of Congress of July 2, 1890.

16. Because said count charges a conspiracy to restrain interstate trade and commerce by means of the acquisition and enjoyment of Letters Patent of the United States and of trade and business under inventions covered by such Letters Patent, in the manner and form set forth in said count, and because the conspiracy so charged, to acquire and enjoy such Letters Patent and the business thereby protected, in the manner and by the means in said count set forth, is not a conspiracy to unreasonably restrain or monopolize interstate trade or commerce, nor is it a conspiracy in unreasonable restraint or monopoly of interstate commerce.

17. Because the allegation that defendants are or were engaged in interstate commerce on, before or after February 7, 1899, is repugnant to and inconsistent with the allegation that they sold and leased machinery covered by Letters Patent of the United States, for, as a matter of law, unless and until released by the owner of the patent from the domain of his monopoly, patented articles are not articles of trade or commerce among the several States within the meaning of the said Act of July 2, 1890, and the lessor or vendor thereof is not engaged in interstate commerce.

18. Because the shoe manufacturers referred to in said count were not engaged in interstate trade or commerce by leasing patented shoe machinery from the defendants for the reasons set forth in said last named ground.

19. Because no offence under said Act of Congress of July 2, 1890, is set forth in this count in that it appears that the business of said defendants with said shoe manufacturers was covered by Letters Patent of the United States, and as a matter of law such business is independent of and not embraced under or in conflict with the said Act.

20. Because the leases referred to in said count concern patented articles, and the defendants had the right to insert such provisions in said leases as are not in their very nature illegal or contrary to public policy, and said count does not charge that the terms or conditions of said leases as alleged were even contrary to public policy.

21. Because said count sets forth no offence in that the organiz-

ing of the United Shoe Machinery Company, as alleged, and the accepting and taking over and holding of the capital stocks and business of the three corporations by such United Company was not a conspiracy in restraint of trade of the shoe manufacturers.

22. Because said count sets forth no offence in that the alleged turning over by the defendants to a new corporation, which they are alleged to have managed and controlled, was not and is not a conspiracy in restraint of the trade of the shoe manufacturers.

23. Because the allegation on page 45 (41, 42) [typewritten page 55] as to defendants discouraging and preventing others from inventing competing devices, is inconsistent with and repugnant to the further allegation in this count that defendants engaged in a conspiracy to restrain the trade of the shoe manufacturers, as such acts, if they show any restraint of trade, only show a restraint of trade of the shoe machinery manufacturers, and not of the trade of the shoe manufacturers.

24. Because the allegation on page 49 (44, 45) [typewritten page 60] that said groups have ever been and now are independent of each other, charged as a matter of fact by the Grand Jury, is inconsistent with and repugnant to the prior allegation that the defendants entered into a conspiracy to restrain the trade of the shoe manufacturers by their own device, United Shoe Machinery Company.

25. Because the allegation on page 49 (44, 45) [typewritten page 60] that said groups have ever been and now are independent of each other, charged as a matter of fact by the Grand Jury, is inconsistent with and repugnant to the prior allegation on page 43 (40, 41) [typewritten page 53] that the defendants have together, since the organization of the United Shoe Machinery Company, continued to manage, control and conduct all the business so as aforesaid before independently carried on by said three groups of defendants.

26. Because the allegations of said count are indefinite, uncertain and vague in that it does not appear how or that the said defendants acquired said business of said three groups from said three groups, or that they had any pecuniary or financial interest in the United Shoe Machinery Company.

27. The allegation that the organization by the defendants of

the United Shoe Machinery Company and the turning over to said company of the stock and business of the corporations referred to in said count on page 49 (44, 45) [typewritten page 60], and the taking over and holding of the same by said United Shoe Machinery Company constituted a mere device, and that the defendants have been and are able to carry on such alleged interstate business without restraint and are able to abolish and discontinue the use of said device and withdraw said stocks and business from said United Shoe Machinery Company, are inconsistent with and repugnant to the prior allegation that the defendants organized the United Shoe Machinery Company and turned over to said company the stocks and businesses of said corporations, and that the same were accepted and taken over and held by said United Shoe Machinery Company.

28. Said counts sets forth no offence because if there was any restraint of trade of the shoe manufacturers by the organization of the United Shoe Machinery Company, such restraint was and is only indirect and inappreciable.

29. Said count sets forth no offence in that the organization of the United Shoe Machinery Company and the accepting, taking over and holding by it of the stocks and business of the three other non-competing manufacturing and business corporations as alleged, was not a direct restraint of interstate trade of the shoe manufacturers. Such organization and taking over was not an unreasonable restraint of the interstate trade of the said shoe manufacturers.

30. Because said count sets forth no offence in that the organization of the United Shoe Machinery Company was simply the acquisition of companies engaged in manufacturing and leasing complementary and non-competing machines, and in no way restrained the interstate trade carried on by the shoe manufacturers.

31. Because the said count sets forth no offence in that there is no allegation that defendants, or any of them, either in groups or collectively, conspired to refuse to furnish any shoe manufacturer with any machine desired, or with as many machines as any desired, at a reasonable price.

32. Because said count does not charge that the alleged offence

therein set forth was committed at any place within the jurisdiction of this court.

33. Because said count does not charge with sufficient certainty and particularity that the alleged offence therein set forth was committed at any place within the jurisdiction of this court, inasmuch as it does not charge with sufficient certainty and particularity that the acts of the defendants therein alleged to have constituted the conspiracy charged, were committed within the District of Massachusetts.

34. Said count is uncertain, indefinite and vague in that it is not alleged on page 42 (39,40) [typewritten pages 51, 52] or elsewhere what contracts of sale defendants in their several groups ever made with the shoe manufacturers or the terms thereof, or what machines the said groups ever sold, and what the said groups leased, and such averment is necessary in connection with the averment on page 48 (44) [typewritten page 59] that defendants have ceased to sell any of such shoe machinery to such shoe manufacturers.

35. The allegation on page 46 (42) [typewritten page 56] that the defendants together, at Boston aforesaid in said District of Massachusetts, organized a corporation under the laws of New Jersey, to wit, the United Shoe Machinery Company, is repugnant in that as a matter of law a New Jersey corporation could not be organized in Massachusetts.

Wherefore, each of the defendants prays judgment of said count and that by the court he may be dismissed and discharged.

Demurrer to Third Count.

And each of the defendants, not waiving his right to file further grounds of demurrer if he shall so desire, but insisting upon said right and upon his right to avail himself of all grounds of objection under the above general demurrer, without filing any statement of the same, does further demur to the third count of said indictment, and specially assigns the following causes and grounds of demurrer:

1. Because the matters and things charged in said count do not constitute any offence against the laws of the United States.

2. Because the provisions of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," are too vague, indefinite and uncertain to create and define an offence against the United States, and because there is no statute of the United States which makes it an offence to engage in the monopoly set forth in said count.

3. Because the provisions of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," are too vague, indefinite and uncertain to make the acts charged against the defendants in said count an offence against the United States.

4. Because the Act of Congress of July 2, 1890, declaring monopolies in unreasonable or illegal restraint of interstate trade or commerce to be misdemeanors, is in violation of the Constitution of the United States, in that it delegates to others than Congress the duty of creating and defining offences against the United States, and because there is no statute of the United States defining such unreasonable or illegal restraint.

5. Because said count does not charge that the alleged monopoly or the acts of the defendants therein set forth as constituting the alleged monopoly were in unreasonable or illegal restraint of interstate trade or commerce.

6. Because said count does not charge with sufficient certainty and particularity that, or how or in what manner, interstate trade or commerce was unreasonably or illegally restrained by said alleged monopoly or by the acts of the defendants therein set forth.

7. Because said third count charges the alleged monopoly by referring to and adopting certain charges and allegations contained in the first count of the indictment and certain charges and allegations contained in the second count of the indictment, and because such reference and adoption is too general, vague and indefinite to describe and set forth with sufficient certainty and particularity the offence sought to be charged by the third count, and because, for the reasons stated in the demurrers to said first and second counts, the same do not set forth or charge with sufficient certainty and

particularity any conduct or act of the defendants in unreasonable or illegal restraint or monopoly of trade or commerce and does not set forth or describe with such sufficient certainty and particularity any monopoly in unreasonable or illegal restraint of interstate trade or commerce, and because said third count does not set forth or charge, either by such reference, adoption or otherwise, any conduct or act of the defendants in unreasonable or illegal restraint or monopoly of interstate trade or commerce or whereby the defendants are guilty of any monopoly in unreasonable or illegal restraint of interstate trade or commerce.

8. Said count sets forth no offence because it appears in the allegations thereof, and the allegations in the first and second counts, that such alleged monopolization was done by said United Shoe Machinery Company, or by said United Shoe Machinery Company and other corporations named in said counts, and it is nowhere alleged that the defendants, either jointly or severally, were the sole or principal stockholders or owners therein.

9. Said count sets out no offence because it appears that the monopolization complained of was held, owned, and operated by the United Shoe Machinery Company, and, as a matter of law or fact, there cannot be two monopolizations at one and the same time of the same part of interstate trade and commerce.

10. Said count sets forth no offence in that it is alleged that the business of the defendants being the leasing of patented shoe machinery there cannot, in the nature of things, be any monopoly in such business over and above the patent monopoly.

11. Said count sets forth no offence in that it is indefinite, uncertain and vague and does not set out how or by what means the defendants have built up the power and control of such part of trade and commerce over and above the power and control warranted and permitted therein under Letters Patent of the United States.

12. Said count is indefinite, uncertain and vague in that it does not allege how or in what manner or by what means the four concerns set out on page 54 (48) [typewritten page 66] of said count have been driven out of said trade and commerce as alleged.

13. Inasmuch as the machinery owned by each group was fully covered by Letters Patent, and a complete monopoly of the business in such patented machines was given by said Letters Patent to each group, the turning over of such business of each such group, such turning over embracing said Letters Patent and the monopoly thereof, to the United Shoe Machinery Company, could not in fact or in law extend said monopoly.

14. Because the leases referred to in said count concern patented articles, and the defendants had the right to insert such provisions in said leases as are not in their very nature illegal or contrary to public policy, and said count does not charge that the terms or conditions of said leases as alleged were even contrary to public policy.

15. Because it is not alleged in said count that said concerns whose portion of said trade and commerce said defendants have drawn and grasped, or any of said concerns, were engaged in interstate commerce.

16. Because it is nowhere alleged in said count how or in what manner said defendants have drawn and grasped the trade and commerce of other concerns, or what the trade and commerce of said other concerns or any of them was.

17. Because it is not alleged in said count that such other concerns, which defendants are alleged to have driven out of trade and commerce, were engaged in interstate commerce.

18. Because said count does not charge that the alleged offence therein set forth was committed at any place within the jurisdiction of this court.

19. Because said count does not charge with sufficient certainty and particularity that the alleged offence therein set forth was committed at any place within the jurisdiction of this court, inasmuch as it does not charge with sufficient certainty and particularity that the acts of the defendants therein alleged to have constituted the monopoly charged were committed within the District of Massachusetts.

Wherefore, each of their defendants prays judgment of said count and that by the court he may be dismissed and discharged.

SIDNEY W. WINSLOW,
EDWARD P. HURD,
by their Attorney,
CHARLES F. CHOATE, JR.

WILLIAM BARBOUR,
ELMER P. HOWE,
by their Attorneys,
HENRY F. HURLBURT,
BOYD B. JONES.

JOINDER ON DEMURRER.

[Filed February 16, 1912.]

And Asa P. French, who prosecutes for the United States in this behalf, says that the said indictment and each count thereof and the matters therein contained in manner and form as the same are therein set forth, are sufficient in law to compel the said Sidney W. Winslow, Edward P. Hurd, William Barbour and Elmer P. Howe to answer to the same and each count thereof, and that the said Asa P. French, who prosecutes as aforesaid, is ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the said Sidney W. Winslow, Edward P. Hurd, ~~George W. Brown~~, William Barbour and Elmer P. Howe have not answered to said indictment, nor hitherto in any manner denied the same, that they be compelled to answer to the charges therein contained and in each count thereof.

ASA P. FRENCH,
United States Attorney for said District.

JOINDER OF GEORGE W. BROWN IN THE DEMURRER OF OTHER DEFENDANTS.

[Filed February 17, 1912.]

Now comes George W. Brown and joins in the demurrer of the other defendants heretofore filed in this court.

By his Attorney,

CHARLES F. CHOATE, Jr.

JOINDER ON DEMURRER.

[Filed February 17, 1912.]

And Asa P. French, who prosecutes for the United States in this behalf, says that the said indictment and each count thereof and the matters therein contained in manner and form as the same are therein set forth, are sufficient in law to compel George W. Brown, one of the defendants named therein, to answer to the same and each count thereof, and that the said Asa P. French, who prosecutes as aforesaid, is ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the said George W. Brown has not answered to said indictment, nor hitherto in any manner denied the same, that he be compelled to answer to the charges therein contained and in each count thereof.

ASA P. FRENCH,

United States Attorney for said District.

68a *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the District Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, in a cause entitled United States, by indictment, against Sidney W. Winslow, Edward P. Hurd, George W. Brown, William Barbour, and Elmer P. Howe, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the * twenty-ninth day of April next, in the said Supreme Court, at Washington, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the thirtieth day of March, in the year of our Lord one thousand nine hundred and twelve.

CHARLES K. DARLING,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by—
FREDERIC DODGE,
U. S. District Judge.

68b *Return of district court on writ of error.*

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss.

And now, here, the judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

* Not exceeding 30 days from the day of signing the citation. Rule 14, sec. 5.

In testimony whereof, I, Charles K. Darling, clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court this seventeenth day of April, A. D. 1912.

[SEAL.] CHARLES K. DARLING, *Clerk.*

69 *Transcript of record of district court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States, within and for the district of Massachusetts, on the first Tuesday of December, being the fifth day of December, in the year of our Lord one thousand nine hundred and eleven.

Before the honorable Frederic Dodge, district judge.

No. 113, criminal docket.

UNITED STATES, BY INDICTMENT,
v.
SIDNEY W. WINSLOW ET AL.

INDICTMENT.

(Filed in Circuit Court September 19, 1911.)

(MEMORANDUM.—The indictment, as printed in this transcript of record, beginning on page 1, is here inserted. Charles K. Darling, clerk.)

This indictment was presented by the grand jury at the February term of the Circuit Court, A. D. 1911, and was thence continued to the October term of said Circuit Court, when, to wit, November 4, 1911, the following demurrer of defendants, Sidney W. Winslow et al., was filed.

DEMURRER OF DEFENDANTS, SIDNEY W. WINSLOW, EDWARD P. HURD, WILLIAM BARBOUR, AND ELMER P. HOWE.

(Filed in Circuit Court November 4, 1911.)

(MEMORANDUM.—The demurrer of defendants, Sidney W. Winslow, Edward P. Hurd, William Barbour, and Elmer P.
70 Howe, as printed in this transcript of record, beginning on page 49, is here inserted. Charles K. Darling, clerk.)

At the same term, to wit, November 21, 1911, came the United States attorney for this district and said that he would no further prosecute the defendant, James J. Storrow, on said indictment.

This cause was thence continued to the present December term of the District Court, A. D. 1911, when the same is set down for hearing on demurrer and fully heard by the court on the fourteenth, fifteenth, and sixteenth days of February, A. D. 1912, the honorable William L. Putnam, circuit judge, duly assigned to hold said district court, sitting.

At the same term the following joinders on demurrer are filed:

JOINDER ON DEMURRER.

(Filed February 16, 1912.)

(MEMORANDUM.—The joinder on demurrer, as printed in this transcript of record, on page 67, is here inserted. Charles K. Darling, clerk.)

JOINDER OF GEORGE W. BROWN IN THE DEMURRER OF OTHER DEFENDANTS.

(Filed February 17, 1912.)

(MEMORANDUM.—The joinder of George W. Brown in demurrer of other defendants, as printed in this transcript of record on page 68, is here inserted. Charles K. Darling, clerk.)

JOINDER ON DEMURRER.

(Filed February 17, 1912.)

(MEMORANDUM.—The joinder on demurrer, as printed in this transcript of record on page 68, is here inserted. Charles K. Darling, clerk.)

Also at the same term, to wit, March 2, 1912, after due consideration thereon had, an opinion of the court is announced sustaining the demurrer to the indictment.

On the same day judgment on demurrer is entered as follows, in accordance with said opinion:

71 "The indictment is adjudged insufficient in law; the demurrer thereto is sustained; and the respondents go therefrom without day."

A true record:

Attest: CHARLES K. DARLING, *Clerk.*

On the twenty-third day of March, A. D. 1912, a draft bill of exceptions is filed by the United States and presented to the court under rule 17 and within extended time.

On the twenty-ninth day of March, A. D. 1912, the following bill of exceptions of the United States is allowed:

BILL OF EXCEPTIONS OF THE UNITED STATES.

(Filed March 23, 1912; allowed March 29, 1912.)

Be it remembered that on the 14th, 15th, and 16th days of February, 1912, during the December term, 1911, of the District Court of the United States for the District of Massachusetts, the honorable William L. Putnam, circuit judge, presiding, there came on to be heard the case of United States against Sidney W. Winslow, Edward P. Hurd, George W. Brown, William Barbour, and Elmer P. Howe, under an indictment found in said court during the February term, 1911, containing three counts and purporting to be based upon an act of Congress approved July 2d, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies." The defendants thereupon demurred to each of said counts, generally and specially. Argument was had upon said demurrers, and subsequently, to wit, on the 2d day of March, 1912, said court sustained the demurrers as to each of said counts. The United States is aggrieved by that part of said decision which sustained the defendants' demurrers to the first and second counts of said indictment, whereby the said court, in substance, construed the first section of said act of July 2, 1890, as not applicable to the state of facts alleged in said first and second counts, respectively, and held, in substance, that neither said first or second count states a case within the meaning and intent of said first section, to which rulings of the court and to each of which the United States then and there excepted and still excepts.

The opinion of the court, filed March 2, 1912, is made a part of this bill of exceptions and the court does not, by allowing this bill of exceptions, either admit or deny the construction given said opinion in this bill of exceptions.

72 And now, in furtherance of justice and that right may be done, the United States of America, by Asa P. French, Esquire, United States attorney for the District of Massachusetts, tenders and presents the foregoing as it bill of exceptions in this case to the action of the court and prays that the same may be settled, allowed, signed, and sealed by the court and made a part of the record, and the same is accordingly done, this twenty-ninth day of March, 1912.

W. L. PUTNAM,
United States Judge.

Presented Mch. 23/12.
F. D.

District Court of the United States,

DISTRICT OF MASSACHUSETTS.

No. 113, Criminal Docket.

UNITED STATES, BY INDICTMENT,

v.

SIDNEY W. WINSLOW ET AL.

No. 114, Criminal Docket.

SAME v. SAME.

OPINION OF THE COURT.

March 2, 1912.

PUTNAM, J. These cases came before us on demurrer. They are indictments based on the act of July 2, 1890, 26 Stat. 209, c. 647, commonly known as the Sherman Anti-Trust Act. No. 114 seems to be less complicated by special circumstances than No. 113. We will, therefore, take up that first. It contains two counts. The first is based on the second section of the act referred to, relating to monopolies, and the second on the first section, which declares illegal certain contracts and combinations or conspiracies in restraint of trade, and punishes "every person who shall make any such contract or engage in any such combination or conspiracy." The second section of the act impliedly permits an indictment for building up a monopoly, as well as inaugurating it or maintaining it, and, therefore, may relate to a series of acts following each other, all covered into one indictment or count, without the indictment or count being chargeable with duplicity. The offence under the first section permits in one count an alle-

gation of only a single transaction, that is, an allegation of making one contract, or engaging in one combination or conspiracy, so that while, by virtue of the decisions of the Supreme Court in *United States* v. *Kissel*, 218 U. S. 601, 607, and *United States* v. *Barber*, 219 U. S. 72, 78, such a combination or conspiracy, when once effected, may be continuous, yet only one contract or one conspiracy can properly be alleged in any one count. For this reason, as we go on, we will find that the second count, under the circumstances of the case, must be held invalid in law.

There is such a chaos of decisions in reference to the Sherman Anti-Trust Act, and such a chaos of understanding or misunderstanding with reference thereto, and this case apparently is regarded as of so important a character, that any conclusions a single judge may reach may prove of very little importance. It is not for the court here to judge of the possibility of a writ of error lying in these cases to the Supreme Court, but it is hoped by the court that such may be permissible. The court, moreover, cannot overlook the fact, in accordance with the practice shown in *United States* v. *N. Y., N. H. & H. R. Co.*, 165 Fed. Rep. 742, decided on December 4, 1908, that the United States, under the act approved February 11, 1903, 32 Stat. 823, have the privilege of demanding, on a bill in equity, the constitution of a court of three judges to pass on the issues fundamentally involved here; of course, much broadened out and made much more certain as they would be on a bill in equity. Also, the court, having a right to know its own records, cannot overlook the fact that such a bill in equity is pending in this district, subject to be advanced for hearing in accordance with the statute last named. Nevertheless, the court, being appealed to as the parties have a right to appeal to it, must do its duty as best it can.

It will turn out that, notwithstanding the apparent conflict, and as we say chaos, of decisions, there is a clear path through them all to a satisfactory determination of the fundamental question involved here. It may be found, however, that certain incidental matters are proposed as to which there is uncertainty necessarily involved, by reason of the multiplicity of the allegations relating thereto;

and as to these the court reserves to itself the right to appeal to *Kansas* v. *Colorado*, 185 U. S. 125, 145, 147. The rule there is stated with reference to suits in equity where the issues are raised on demurrer; but it is equally applicable, on fundamental principles, to a criminal proceeding. In complicated cases demurrers sometimes shut out the merits, and sometimes, so far as the case involved is concerned, bring before the court only a partial and inadequate view thereof. It is with great satisfaction that we may rely on the rule from Daniell stated in *Kansas* v. *Colorado* at pages 144 and 145, as follows:

"The pursuit of this course, on occasion, is thus referred to by Mr. Daniell (p. 542): 'The court sometimes declines to decide a doubtful question of title on demurrer; in which case, the demurrer will be overruled, without prejudice to any question. A demurrer may also be overruled, with liberty to the defendant to insist upon the same defence by answer, if the allegations of the bill are such that the case ought not to be decided without an answer being put in. . . . A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this: that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the court to modify the relief or to grant no relief at all, the court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer.'"

The conclusion of the court, stated at page 147, was as follows:

"The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence. Demurrer overruled, without prejudice to any question, and leave to answer."

There have been brought to our attention two decisions in this district, one of them, *Oliver* v. *Gilmore*, 52 Fed. Rep. 562, rendered independently of any question arising under the statutes of the United States, and the other, *United States* v. *Patterson*, rendered June 1, 1893, reported in 55 Fed. Rep. 605, and again in 59 Fed. Rep. 280. As the theory of the latter case has never been approved, we will not refer to it further; but the former

case, *Oliver* v. *Gilmore*, deserves some consideration, as we will state later.

The incidental questions we will dispose of now. It is objected that the respondents are joined as officers of various corporations around which this litigation gathers, that one corporation is the principal, and that the respondents are only officers or directors thereof. The indictment, however, expressly charges them as actors, and two fundamental principles are thoroughly settled. One is that neither in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present and efficient actor; and the second is that all parties active in promoting a misdemeanor, whether agents or not, are principals. The rule distinguishing between directors of a corporation who are simply charged as such and directors acting an immediate, special part in the proceedings in question, was pointed out and settled by the Circuit Court of Appeals for this circuit in *National Cash Register Company* v. *Leland*, 94 Fed. Rep. 502, 508, 509. Although that was a civil suit for damages on account of an infringement of a patent right, the principles apply here as well as there.

Some questions are also made with reference to the method of setting out certain documents involved here. There are a great many documents all of the same class relied on by the United States. None of them is specifically described, nor any allegations beyond describing the substance thereof as understood by the United States. We may return to this later if we find it necessary; but all we need say at present is that, where whatever are involved are so numerous that they cannot be stated at length, or in detail, without encumbering the record to an extent beyond all practical rules of convenience, they may be stated generally. Also, as ruled by the Circuit Court of Appeals for this circuit in *Pooler* v. *United States*, 127 Fed. Rep. 509, 517, and by the Circuit Court in *United States* v. *Grunberg*, 131 Fed. Rep. 137, 139, it is not ordinarily necessary to set out an instrument by its tenor unless it becomes directly the subject-matter of the litigation.

We will not notice particularly all the other propositions made by the respondents, which are numerous; but we will touch upon

them so far as we think they require attention, grouping in our observations sometimes several minor propositions made by the respondents, classifying as far as possible those relating to similar topics.

The counts contained in each of the two indictments, which are based on the first section of the act in question, declaring illegal combinations or conspiracies in restraint of trade, are objected to, with several forms of expression of the objections, because they do not suitably charge in what manner interstate commerce was in fact unreasonably restrained. In this respect the respondents rely on expressions made by us in *United States* v. *John Reardon & Sons Company*, 191 Fed. Rep. 454, 456, in reference to the same statute now under discussion, to the effect that "the fundamental rule, which never has been overthrown by the Supreme Court, although there are undoubtedly numerous expressions which would seem to shake it, is that it is never sufficient to allege that an act is illegal, but the United States must allege something more which the court can see on the face of the indictment is illegal if the facts are proven as alleged." We stand firmly by this proposition; yet, as the offence under the first section requires only charging the combination in some form or other, with at most only an allegation of an overt act, it is not necessary to show that the purpose of the combination was accomplished, and, therefore, objections of the character just stated are not effectual. It is nevertheless objected that the methods contemplated by these combinations are not properly set forth within the general rule cited from our prior decision. We observe that, of course, while, as with reference to other alleged criminal acts, the intent must be sufficiently set out to show malice in fact or in law, so in these cases such intent must be set out; and this has been done. Of course, the court fully understands the other settled rule of law that the use of adjectives and adverbs, no matter how much reiterated, is not sufficient, although required; and also that facts enough must be stated in detail to enable the court to determine for itself whether or not the alleged combination or conspiracy is to be carried out by what are in truth unlawful methods. We think as we leave this case it will be free from all objections in the latter behalf.

78

It was claimed at the arguments that there is not a sufficient allegation establishing the jurisdiction in this district; but it is plainly inferable from all that is stated in the indictment that the formation of the conspiracy was within this district. This topic, as thus presented to us, is within section 954 of the Revised Statutes, and is so far a matter of form that it should have been specially set out in the demurrer. Whether it was or not, has not been brought to our attention.

It is also said that the United Shoe Machinery Company, the organization which lies at the basis of these indictments, was created under the laws of New Jersey, and that certain allegations with reference to its organization in the State of Massachusetts are repugnant; but the criminal law is not hampered by considerations of this character, and it looks through all such forms, regarding them rather as possibly ineffectual ~~invasions~~ evasions.

Also, a question of constitutionality is raised on the ground that what is known as the Sherman Anti-Trust Act is too indefinite to lay the foundation of a criminal proceeding. It is true that the Constitution of the United States requires that, in all criminal prosecutions, the accused "shall be informed of the nature and cause of the accusation," and that this applies, not merely to the information or indictment, but to the statutory provisions on which the proceeding is based. It must not be forgotten that the framers of the Constitution of the United States, and of the earlier State Constitutions, lived at a time when the recollection of the cruelties of tyrannical proceedings, and the suffering and injustice coming therefrom, were fresh, and, to a large extent, topics of consideration; and when the provisions of constitutional law necessary to protect against such had been thoroughly thought out. In this aspect the framers of these constitutions were vastly more alive to the necessity of provisions of the kind we have quoted, and other like provisions, than the present generation. The favorite resources of tyrants were punishing alleged crimes which had no existence prior to the punishment, and arresting and holding in imprisonment for indefinite periods, and afterwards forfeiting both property and life, without furnishing those charged any knowledge

of the charges laid against them; and the same men who framed these constitutions soon learned from immediate contact with the bloody revolution in France that, for all injustice and cruelties, excited or prejudiced multitudes are more pitiless than monarchs, emperors, czars, and all individual tyrants. Consequently, looking at the experience of our forefathers more than at our own, it is the duty of courts and of communities to stand firm in behalf of constitutional provisions such as we have quoted, and more especially in behalf of those dividing the government into departments as an absolute preventative against those who make charges, and prosecute them, becoming directly or indirectly the judges. We have lived in so much peace for more than a century under the protection of the constitutional provisions to which we refer, that whole masses of citizens and some of their leaders, are slumbering in reference to them, while our forefathers, who were brought into almost immediate contact with all the devices to which tyranny was accustomed, were fully awake. The courts, however, are not permitted to slumber. We nevertheless know of no case where statutes have been so general or loose as to have been held to violate the constitutional provision on which the respondents here rely. Moreover, the facts are supposed to be known to the respondents. They are chargeable also, according to the usual assumption of law, with knowledge of the law. Therefore, the facts being alleged in detail in the indictment, the respondents are supposed to be advised fully of what is intended to be charged against them. Certainly it is not so plain that the statute so violates the Constitution as to justify us in holding it unconstitutional in the absence of any adjudication by the Supreme Court.

Nevertheless, while in theory the respondents are chargeable as we say, yet in fact the practical application of this branch of the law is very uncertain. The Supreme Court has undertaken to define it in part in *Oregon Steam Navigation Company* v. *Winsor*, 20 Wall. 64, already referred to; which in *Oliver* v. *Gilmore*, 52 Fed. Rep. 562, ~~already referred to~~, we supplemented by further classification. The ~~history of the~~ law as shown in these two cases,

and also in the *Standard Oil Company* v. *United States*, 221 U. S. 3, is in a continuous state of development, and will undoubtedly so remain for an indefinite period. This makes it practically so indefinite, both under the statute in question and aside from it, that criminal prosecutions like this at bar impose great hardship, by terrorizing very considerable portions of the community who have acted honestly, through the possible peril of enormous fines, and terms of imprisonment even for very many years. Under the circumstances, we are unable to understand why the Department of Justice directs, and the President permits, criminal proceedings like this until, in the particular case, the practical application of the statute has been settled by civil proceedings, in view especially of the fact that the flexible methods of bills in equity are capable of exploiting all doubtful questions much more thoroughly, and with more just results, than criminal proceedings.

The respondents claim that the indictments do not allege sufficiently that they were engaged in interstate commerce within the meaning of the Sherman Anti-Trust Act. They seem to rest this mainly upon the fact that they are leasing machinery instead of selling it; but this fails so entirely to impress us that we do not dwell on it. On the whole, we are not much impressed with the respondents' criticisms so far as they relate to mere matters of form, with a single exception which we will immediately state.

Of course, in a case of this nature, under a new statute, the precedents, whether in text-books or decisions, do not furnish standard forms of indictments, and there will be a great variety of forms of expression and methods of arrangement among different pleaders; but we are struck in the present case with the apparent frankness on the part of the United States in attempting to bring before us exactly the facts as they exist, or as they claim them to be, and we think they have done so. We may, however, as well say it now, that we must reject the third count in indictment 113. That count, with certain general statements, describes the pith of the alleged offence as follows:

"and under the circumstances and conditions in said first and second counts set forth with reference to said trade and commerce

and the subjects thereof, (the allegations of said first and second counts in that behalf, including the allegations as to knowledge, intent and design on the part of said defendants, and as to methods adopted and used by them, being by reference incorporated into this count of this indictment as fully as if herein repeated),"

Modern practice fully justifies references in the later parts of an indictment to earlier parts of the same indictment for the details of matters properly set out in the earlier parts, and this has been correctly done with reference to the second count in indictment 114; but this practice is subject to the fundamental rules of pleading that duplicity and repugnancies must be avoided. The trouble here is as follows:

We have studied the first and second counts in this indictment with the view of ascertaining the necessity of the second count and wherein it differs from the first count; and we have been unable in what study we have given them to analyze them with certainty in this respect. They are apparently looking generally to the same circumstances, so that all we have been able to do is to adopt the explanation of the United States in its supplemental brief in this respect. It alleges that the facts in the second count are substantially similar to those set out in count one, with such changes as were necessary to charge a conspiracy to restrain the interstate trade of shoe manufacturers by restricting their liberty of purchase in the shoe machinery markets. The arguments at the bar, however, as well as the supplemental brief for the United States, give us the understanding, as in fact it is stated in that brief, that the merger described in the first count created a combination which improperly restrained the defendants themselves in the management of their respective portions of interstate commerce. Consequently the references to the first two counts inevitably inject into the third count allegations which, combined into one count, involve serious difficulties arising from duplicity and repugnancies, inasmuch as restraint of commerce of manufacturers of machines as among themselves, and restraint of commerce generally with reference to purchases from those manufacturers, are in law essentially different things; and the facts leading up to them are therefore necessarily

different in certain essential features. The respondents were entitled to meet in the third count clear and consistent allegations in accordance with the fundamental rules of pleading. As this is not vouchsafed them, the third count of indictment 113 must be held, for these special reasons, insufficient in law.

We have now reached the point where we can state the substance of what we have under consideration. The supplemental brief for the United States, filed by leave of court on February 21, 1912, says that the initial design of the respondents was to be carried into effect as follows:

> "Every count charges that such initial design was carried into effect by means (1) of the union of formerly independent units of interstate commerce in the United Shoe Machinery Company; (2) by means of the system of leases with their tying provisions."

No other fundamental propositions in this connection are stated; and in this particular the brief expresses a result which we had reached by sifting at the conclusion of the arguments made before us whatever was submitted to us therein. We will therefore confine our attention to these two elements, with some subordinate matters which we may feel called on to discuss.

The letter of the statute under consideration contains no qualification whatever, but is aimed at every contract in restraint of trade, and every monopoly, affecting interstate commerce. The only difference in the letter is that the second section, which relates to monopolizing, uses the words "in part," while the first section omits those words. Nevertheless, there can be no question that both sections, so far as this particular is concerned, are to be construed in the same way. The words "in part" are not in the first section, because a conspiracy in restraint of trade in part is inevitably a conspiracy in restraint of trade within the letter of the section. Therefore, neither in determining the matters involved in this litigation nor in weighing the authorities *pro* and *con*, can any distinction be made in that behalf. Nevertheless, in the other particulars, with reference to the letter of the statute, it is inevitable that there should be some qualification which does not appear on its face. Otherwise, contracts in restraint

of trade, and also monopolies, which have always been regarded as innocent and useful, would be denounced to an extent which would demoralize commerce, and utterly defeat the very purpose for which the statute was intended; that is, to advance commerce, and not to destroy it. Restraint is often mere regulation, or temporary obstruction, for the purpose of clearing out the channel and letting the stream flow at full tide. In these particulars the law is not prophetic as to the results of what merchants and manufacturers propose, except so far as it can learn from experience; and in *Oregon Steam Navigation Company* v. *Winsor*, 20 Wall. 64, already cited, the Supreme Court approved a contract which created a complete monopoly, so far as could then be foreseen, of steam navigation along the whole coast of California, and approved a contract restraining that trade for a specific number of years. This was an emphatic illustration of the condition of things which the Sherman Anti-Trust Act found; and the case demonstrates what mischief it might do if interpreted literally. Other examples in the same direction are always close at hand. *Oregon Steam Navigation Company* v. *Winsor, ubi supra*, contained several, including the suggestion, at foot of page 67, in reference to portioning out the country in regard to a secret formula, a suggestion carried into practical effect in *Fowle* v. *Park*, 131 U. S. 88. *Oliver* v. *Gilmore*, already cited, and which we have said was based on *Oregon Steam Navigation Company* v. *Winsor*, is more abundantly illustrative, and attempts to classify. It is interesting in its description of the development of the law given by Lord Justice Fry, than whom no one in England knew it better; although it must be said that we have not advanced in the United States so far as the famous Mogul case.

Independently of this, there is the well settled rule that statutes are not to be interpreted to change the common law except so far as a purpose so to do is necessarily implied. As said by Mr. Justice Brewer with reference to this same statute in *Northern Securities Company* v. *United States*, 193 U. S. 197, 361, decided March 14, 1904, "Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should

be clearly shown." In fact, this rule of construction is so universally recognized, and so fundamental, that we need only call attention to it in this connection.

The contrary understanding seems to have been a long time cultivated as a result of what appears in connection with *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, decided March 22, 1897, although it is sometimes said that that understanding was only the reporter's law, in view of the headnote stated as follows:

"The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable."

In this case, of nine judges only five concurred in the result, one of whom was Mr. Justice Brewer; so that, at the best, the conclusion was that of only five judges against four. But Mr. Justice Brewer, in connection with the expression we have cited from him, vigorously maintained that, although he united with the majority in the Freight Association case, the statute in question was leveled only at unlawful restraints and monopolies; and he added that "Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable, and ought to be upheld." He continued: "The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy." Then follows what we have previously cited from him.

However, all this discussion is rendered unnecessary by the exposition of the law in *The Standard Oil Company* v. *The United States*, 221 U. S., already cited, to the effect that the statute has not revoked the common law in the particulars of which we have spoken, but has left it as stated in *Oregon Steam Navigation Company* v. *Winsor*, and *Oliver* v. *Gilmore*, and by Mr. Justice Brewer in the citations made from him. This appears all through the opinion of the Chief Justice, but is intensified by the following references,

to wit: Referring to the expressions found in the statute "restraint of trade" and "monopolies," it says at the top of page 51: "It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question." Near the top of page 59 the opinion is more emphatic with reference to the common law definitions, as follows: "Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law, or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."

A full exposition is found on page 60, as follows:

"And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce, or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

In order, moreover, to understand what the opinion meant by its reference to the standard of reason which had been applied at the common law, and for which, unfortunately, the short expression "rule of reason" has been substituted, we quote at length from pages 58 and 59 as follows:

"Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would

flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public, and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England."

Returning for an instant to the short expression "rule of reason," found in the opinion from which we have quoted, which, without the context, is misleading: it simply is in line with what was said by Blackstone in an exaggerated manner, that some lawyers tell us that the law is the perfection of reason. It was merely a short way of expression to the effect that the present state of the common law on that topic is the result of development along reasonable lines, and hand in hand with modern commercial advance.

We are now in position to explain in detail the facts so far as they are concerned with the two principal points which we have to consider; namely, the fundamental nature of the original combination and the alleged abnormal and oppressive nature of the leases referred to. The facts as to the combinaiton are alleged in the first count, indictment 114, to have been as follows, namely: the defendants —

"continuously and at all times during the period of time from the seventh day of February in the year eighteen hundred and ninety-

nine to the nineteenth day of September in the year nineteen hundred and eleven, and therefore continuously, and at all times during the three years next preceding the finding and presentation of this indictment, at said Boston, in the manner and by the means hereinafter described, unlawfully and knowingly have monopolized part of the trade and commerce among the several States of the United States, that is to say, the trade and commerce hereinafter mentioned and described," "and that continuously for many years prior to and throughout said period of time there has been carried on an extensive industry, consisting of the manufacture and sale of certain articles of merchandise, to wit, boots and shoes, in the following cities and towns in the several States of the United States, to wit:"

Then follows a long list of the cities and towns referred to.

The indictment then continues:

"which said articles of merchandise, prior to and throughout said period of time, have been manufactured almost entirely by the aid and use of various kinds of essential machinery, which for the purposes of this indictment are grouped as follows:

"(Group I)—*Lasting Machines*—The machines included in this group are designed and used for the purpose of lasting the uppers of shoes.

"(Group II)—*Welt Sewing Machines and Outsole Stitching Machines*—The machines included in this group are designed and used for the purpose of sewing the seam which attaches the upper to the outsole of a turn shoe, and the seam which attaches the upper and welt to the insole of a welt shoe, and for sewing the welt of a welt shoe to its outsole.

"(Group III)—*Heeling Machines*—The machines included in this group are designed and used for preparing and attaching the heels of shoes.

"(Group IV)—*Metallic Fastening Machines*—The machines included in this group are designed and used for the purpose of preparing and inserting metallic fastenings in shoes."

The indictment then further states the facts as follows:

"And the grand jurors aforesaid, upon their oath aforesaid, do further present, that for many years prior and down to said seventh day of February in the year eighteen hundred and ninety-nine, several separate corporations, operating independently, and in competition with each other, were engaged in trade and commerce among the several States of the United States in the sale and lease

of the machines included in said groups of shoe machinery, and that among the said corporations engaged in said industry were the following, to wit:

"Goodyear Shoe Machinery Company, corporation of the State of Maine, with its principal factory at said Boston, was engaged in interstate trade and commerce in the sale and lease of machines designed and used for the purpose of sewing the uppers to the soles of shoes, and machines designed and used for the purpose of lasting the uppers of shoes; the said machines are included in Groups I and II, aforesaid;

"Consolidated & McKay Lasting Machine Company, corporation of the State of Maine, with its principal factory at Beverly, in said District of Massachusetts, was engaged in interstate trade and commerce in the sale and lease of machines designed and used for the purpose of lasting the uppers of shoes; the said machines are included in Group I, aforesaid;

"McKay Shoe Machinery Company, corporation of the State of Maine, with its principal factory at Winchester, in said District of Massachusetts, was engaged in interstate trade and commerce in the sale and lease of machines designed and used for preparing the heels and for attaching them to shoes, and in the sale and lease of machines designed and used for the purpose of metallic fastenings; the said machines are included in Groups III and IV, aforesaid;

"Eppler Welt Machine Company, corporation of the State of Maine, with its principal place of business at said Boston, was engaged in interstate trade and commerce in the sale and lease of machines designed and used for the purpose of sewing the uppers to the soles of shoes, which said machines were particularly adapted to the manufacture of welt and turn shoes; the said machines are included in Group II, aforesaid.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present, that prior to and until said seventh day of February in the year eighteen hundred and ninety-nine, the several companies hereinbefore mentioned and described, sold and leased in the aggregate eighty-five per cent. of all the machines included in all of said groups of shoe machinery so sold and leased to manufacturers of shoes engaged in business in the several States of the United States, but no one of said companies sold and leased or controlled the sale and lease of a majority of all the machines included in all of said groups."

Then follow allegations that prior to the seventh of February, the several respondents were severally engaged in promoting the groups already referred to, and which are concerned. Then the indictment proceeds as follows:

"And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on said seventh day of February in the year eighteen hundred and ninety-nine, said defendants Sidney W. Winslow, William Barbour, Edward P. Hurd, Elmer P. Howe, George W. Brown and James J. Storrow, in pursuance of agreements among them to eliminate all competition, which, for a number of years prior to said date, had existed among said Consolidated and McKay Lasting Machine Company, Goodyear Shoe Machinery Company, McKay Shoe Machinery Company and Eppler Welt Machine Company, and as a device and means for monopolizing, and whereby they have monopolized the trade and commerce among the several States of the United States in the sale and lease of the machines included in each and all of said groups of shoe machinery, caused to be organized and took an active part in the organization of United Shoe Machinery Company, a corporation, under the laws of the State of New Jersey, hereinafter in this count of this indictment referred to as United Company, with broad powers under its charter to manufacture, buy, sell, lease, operate and deal in and with all kinds of machinery, tools and implements, and especially in everything in any way connected with or useful in the manufacture of shoes, which said United Company, either immediately or soon after its organization, acquired and took over (the exact date of such acquisition being to the grand jurors unknown) substantially all of the capital stock and the business and assets of each said Consolidated and McKay Lasting Machine Company, Goodyear Shoe Machinery Company, McKay Shoe Machinery Company and Eppler Welt Machine Company, by means of the issue and exchange of the capital stock of said United Company.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, through said United Company, after its organization, to wit, on or about said seventh day of February in the year eighteen hundred and ninety-nine, and upon the acquisition by said United Company of substantially all of the capital stock and of the business and assets of each said Consolidated and McKay Lasting Machine Company, Goodyear Shoe Machinery Company, McKay Shoe Machinery Company and Eppler Welt Machine Company, then acquired control of eighty-five per cent. of the trade and commerce among the several States of the United States in the sale and lease of each and every machine included in each and all of the said groups of shoe machinery."

The indictment further alleges:

"And the grand jurors aforesaid, upon their oath aforesaid, do

further present, that said defendants have, throughout said period of time, carried on directed and controlled, and caused to be carried on, directed and controlled their said trade, and commerce in the sale and lease of the machines included in said groups of shoe machinery, by the device and means of and through and in the names of said United Company, corporation as aforesaid, and United Shoe Machinery Corporation, a corporation of the State of New Jersey, and through certain other corporations which said defendants dominate and control."

Then follows a list of minor companies of which the United Shoe Machinery Company is said to have obtained control.

The foregoing completes the picture of the combination sought to be penalized under the Sherman Anti-Trust Act. It is to be noted that this count of indictment 114 claims that the combination of the four groups of machinery which we have described, was intended to suppress competition; but the detailed facts therein overrule this alleged purpose, and shut out suggestions of an intention in the way of suppressing competition, as we will show:

The alleged agreement was the combination of several interests controlling the various groups I, II, III and IV. Admitting that each was controlled by a separate organization without any cross-holding, it would have been clear that the result would have been simply a union of four different industries, not competing, but supplementing each other. A careful examination of the record shows, however, that, although the Goodyear Company, the McKay Shoe Machinery Company, the McKay Lasting Company and the Eppler Welt Company nominally controlled independently of each other shares in the business to which groups I and II were related, yet the cross-holdings of the respondents in these corporations prevented any competition prior to February, 1899; so that the *status* was the same as though groups I and II formed one group, and only groups III and IV were separate and independent groups. No complaint whatever is made in the indictment of the grouping in the way stated; and more by way of illustrating our line of reasoning than for anything else, we will add here that in indictment 113, which seems to assume that the various machines to which these indictments relate were covered by patents, it is

expressly admitted that the original groups I, II, III and IV controlled monopolies, and that yet those monopolies were not of an illegal character.

Taking up again the second count in indictment 114, which refers back for all details to the first count, it plainly alleges only a conspiracy. It states that the respondents "unlawfully and knowingly conspired to monopolize." This expression is plainly adapted to a combination only. Therefore we accept this count as such, leaving the first count of indictment 114, which we will approach later, as alleging a completed monopoly under the second section of the act.

Coming back, therefore, to the proposition that the second count alleges only a conspiracy, the rules of pleading confine it to one conspiracy. As said in *United States* v. *Kissel*, 218 U. S. 601, *ubi supra*, and according to the clear rules of law, it may well be regarded as a continuous conspiracy. Nevertheless, as was said on page 608, "the contract is instantaneous," though "the partnership may endure as one and the same partnership for years"; adding, "a conspiracy is a partnership in criminal purposes." Therefore it follows that the whole offence under the second count of indictment 114 is a combination formed on the seventh day of February, 1899, with the purposes and intentions then existing which we have described, and nothing more. This combination, then formed, was purely an economic arrangement, not in violation of any rule in restraint of trade at common law, or which has been announced by the Supreme Court, as is shown by an examination of all the cases decided by that tribunal.

It seems to be impossible to deny that the combination of various elements of machinery, all relating to the same art and the same school of manufactures, for the purpose of constructing economically and systematically, and of furnishing any customer, the whole or any part of an entire system, is in strict and normal compliance with modern trade progress; as also it might be in strict compliance with modern progress to limit the manufacture and supply to certain details, as, for example, steam guages, wheels for railroad cars, or axles for steam locomotives, without furnishing anything else, although by so doing, the manufacturer of

details becomes able to command the entire market. It is absolutely normal, and in accordance with the rightful demand of the market, for any dealer to supply mere details or an entire system of machinery, according as his customers may desire.

Such being the fact, the law as explained by Chief Justice White at page 58 of *The Standard Oil Company* v. *The United States*, has kept hand in hand with "developing trade." The great leaps which the law has made in this direction, and the reasons why it has made them, ~~is~~ are pointed out in many cases, especially in *Gibbs* v. *The Gas Company*, 130 U. S. 396, 409, where the leap was from *Mitchell* v. *Reynolds*, 1 P. Wms. 181, limited to a single town or city, to *Rousillon* v. *Rousillon*, 14 Ch. D. 351, which covered the whole of Europe as we remember it. At any rate, it covered practically an unlimited territory. In the same line is the distinction made by the Chief Justice in *The Standard Oil Company* v. *United States*, that the unification of power and control over petroleum there under discussion was due "to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to "with the purpose of excluding others from the trade."

So also in *United States* v. *American Tobacco Company*, 221 U. S. 106, at page 182, the Chief Justice distinguished as follows: "We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations." Then follows a number of specifications, among which is this: "By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for purposes of trade."

We have examined every decision of the Supreme Court bearing

on these topics. Some of them, like *Gibbs* v. *The Gas Company*, 130 U. S. 396, 409, already referred to, and the *Freight Association case*, 166 U. S. 290, 335, were decided, or might have been, on the ground that they involved agreements for the suppression of corporations having a public character, which agreements are clearly illegal all over New England. All the other decisions involved a well known rule which prohibits stifling bids and portioning out territory arbitrarily. In this is included *Oregon Steam Navigation Company* v. *Winsor*, already cited, with reference to the excess period of three years explained therein. None of them penalize a combination like that originally formed in the present case. Therefore we cannot adjudge it invalid.

The first count of indictment 114 reaches the case of an alleged completed monopoly, which therefore may include everything, not only the original combination, but whatever occurred down to the time of the finding of the indictment. There are numerous minor matters here which are not covered by either of the two propositions which we have said were specially brought forward in the supplemental brief of the United States; as, for example, the acquiring the "Thomas G. Plant" assets, and several minor corporations. These are only the results, and of themselves add nothing except by way of illustration and aggravation.

What was thus referred to in the supplemental brief of the United States are leases which are declared to be "arbitrary, oppressive and unreasonable." The alleged illegal purpose of the leases is set out at full length, and they are denounced as unlawful devices for eliminating competition. It is also urged that, as a result of these leases, in combination with the four groups consolidated as alleged, the respondents have dominated ninety-eight per cent of the business to which these groups related. We do not attach much importance to this percentage, because that standing alone is like one of the terms of an algebraic equation, which, of itself, is non-efficient. As said in *Oliver* v. *Gilmore*, *ubi supra*, a manufacturer or merchant may, by the mere fact of the quality of his goods, monopolize the market, which is permissible; as, for illustration, one of these

indictments describes the respondents' machines as the best put on the market.

The leases referred to here are the same as those approved in the appeal of *United Shoe Machinery Company* v. *Brunet*, (1909) App. Cas. 330, where the Privy Council decided that the whole combination exhibited here, including leases, was valid. Notwithstanding the decisions of the Privy Council are not authoritative, even in England, like those of the King's Bench, yet the members of the Judicial Committee who sat on this appeal were Lords MacNaughton, Atkinson, Collins and Gorell, making an exceedingly strong court, hardly to be surpassed in England. Therefore we would be free to follow it if the background was the same here as there. But it is not. There, the background was the special findings of a jury; here the indictments allege features going towards making up an illegal monopoly, which are not clearly inoperative on their face; so that we must fall back upon the rule we have cited from *Kansas* v. *Colorado*, 185 U. S. 125, 145, 147. We can easily see that the result of the trial of the issues of fact might remove the apparent illegality arising from these leases; but the case is not so clear that we can sustain the demurrer with reference to the first count of indictment 114. Therefore on the demurrer we hold the second count of indictment 114 invalid, and the first count thereof valid, unless on a trial it appears that the leases we refer to are found to add no obnoxious feature.

Indictment 113 is easily disposed of. We have already shown that the third count is invalid. The first and second counts are invalid for the same reason which invalidates the second count of indictment 114. This indictment 113 was evidently framed to bring out the question whether the fact that various machines manufactured by the United Shoe Machinery Company are protected by patents in whole or in part, is of importance in this connection. As the result we reach cuts under this question, we prefer to postpone its consideration, hoping that the Supreme Court may have to dispose of it in some way before we are forced to proceed with it if ever.

The general result is that, on the face of the record we hold the original agreement of consolidation valid, and that on the pleadings we adjudge the condition arising from the subsequent adoption of the leases in question leaves the first count of indictment 114 not subject to demurrer.

The judgment in 113 is as follows:

The indictment is adjudged insufficient in law; the demurrer thereto is sustained; and the respondents go therefrom without day.

The judgment in indictment 114 is as follows:

The first count is adjudged sufficient in law; and the demurrer thereto is overruled; and the respondents are given leave to plead anew on or before the first day of the March Term, 1912. The second count is adjudged insufficient in law; the demurrer thereto is sustained; and the respondents go therefrom without day.

40724—12——8

March 2, 1912.

(MEMORANDUM.—The opinion of the court is here omitted by direction of counsel, it already having been incorporated as part of the plaintiff's bill of exceptions, and will be found printed in this Transcript of Record on page 73. Charles K. Darling, clerk.)

PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF ERROR.

(Filed March 30, 1912.)

Now comes the United States of America, by its attorney, Asa P. French, and complains that in the record and proceedings had in this cause and in the judgment sustaining defendants' demurrers to the first and second counts of the indictment herein, and adjudging said counts of said indictment insufficient in law, and that defendants go therefrom without day, manifest error hath happened, as will appear in the assignment of errors herewith submitted.

Wherefore, the United States of America prays for the allowance of a writ of error and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

ASA P. FRENCH,
United States Attorney for the District of Massachusetts.

Allowed March 30, 1912.
FREDERIC DODGE,
U. S. District Judge, District of Mass.

97 ASSIGNMENT OF ERRORS.

(Filed March 30, 1912.)

The United States of America, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred in the decision of the court herein sustaining the demurrers to the first and second counts of the indictment herein:

(1) The court erred in sustaining the demurrer to the first count of the indictment herein.

(2) The court erred in sustaining the demurrer to the second count of the indictment herein.

(3) The court erred in holding as a matter of law that the first count of the indictment herein was insufficient in law.

(4) The court erred in holding as a matter of law that the second count of the indictment herein was insufficient in law.

(5) The court erred in not overruling the demurrer to the first count of the indictment herein.

(6) The court erred in not overruling the demurrer to the second count of the indictment herein.

(7) The court erred in holding that the first count did not set forth an offense in violation of section 1 of the act of July 2, 1890, commonly known as the antitrust law.

(8) The court erred in holding that the second count did not set forth an offense in violation of section 1 of the act of July 2, 1890, commonly known as the antitrust law.

(9) The court erred in ruling that the original combination described in each of said first and second counts was not illegal.

(10) The court erred in holding that the original combination described in the second count of the indictment was not illegal, and that, not being illegal, there was no illegal conspiracy charged in said second count.

And the United States aforesaid, pray that the order entered herein sustaining demurrers to the first and second counts of the indictment herein for the errors aforesaid and other errors in the record and proceeding herein may be reversed and altogether held for nothing; and that the plaintiff in error may be restored to all things which it has lost by reason of said order, and that the
98 District Court of the United States for the District of Massachusetts be directed to vacate and set aside said order and to compel the defendants in error to plead to the aforesaid counts of said indictment.

ASA P. FRENCH,
United States Attorney for the District of Massachusetts.

99 *Citation on writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Sidney W. Winslow, of Orleans, Edward P. Hurd and George W. Brown, both of Newton, Elmer P. Howe, of Boston, all in the district of Massachusetts, and William Barbour, of the city of New York, in the southern district of New York, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* twenty-ninth day of April next, pursuant to a writ of error filed in the clerk's office of the † District Court of the United States for the District of Massachusetts, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Frederic Dodge, judge of the District Court of the United States for the District of Massachusetts, this thirtieth day of March, in the year of our Lord one thousand nine hundred and twelve.

FREDERIC DODGE,
U. S. District Judge.

* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

100 *Officer's return on citation on writ of error.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, *April 4th, 1912.*

I hereby certify that on the fourth day of April, 1912, I served the within citation by delivering to the within-named George W. Brown, and on the 5th and 8th instants by delivering to the within-named Edward P. Hurd and Elmer P. Howe, respectively, all in hand at said Boston, an attested copy of this precept, and thereafter, on the 13th day of said April, I served the within citation on the within-named Sidney W. Winslow and William Barbour by delivering an attested copy of this precept in hand at said Boston to Charles F. Choate, Esq., counsel for said Winslow and Henry F. Hurlbut, Esq., of counsel for said Barbour, each attorney accepting service hereof as appears by his endorsed acceptance hereon.

GUY MURCHIE,
United States Marshal.
By CHARLES A. BANCROFT, *Deputy.*

Fees:

Service	$10.00	$10.24
Travel	.24	

I hereby accept service of this process for the within-named Sidney W. Winslow.

CHAS. F. CHOATE, Jr.

I hereby accept service of this process for the within-named William Barbour.

HENRY F. HURLBURT,
Of Counsel for Wm. Barbour.

APRIL 13, 1912.

101 *Clerk's certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled, No. 113, criminal docket, United States, by indictment, v. Sidney W. Winslow et al., in said District Court determined, the bill of exceptions of the United States, the petition of the United States for writ of error, the assignment of errors, and also the original citation on writ of error issued in said cause, with the officer's return on citation on writ of error.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said district, this seventeenth day of April, A. D. 1912.

[SEAL.] CHARLES K. DARLING, *Clerk.*

(Indorsement on cover:) File No. 23172. Massachusetts D. C. U. S. Term No., 1096. The United States, plaintiff in error, vs. Sidney W. Winslow, Edward P. Hurd, George W. Brown, William Barbour, and Elmer P. Howes. Filed April 22d, 1912. File No. 23172.

40724—12——4

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, PLAINTIFF IN ERROR, *v.* SIDNEY W. WINSLOW ET AL., DEFENDANTS IN ERROR.	}	No. 620.

ON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO ADVANCE.

The Solicitor General moves that the above-entitled case be advanced for hearing at an early date in the present term.

The United States indicted Sidney W. Winslow *et al.* for violation of sections 1 and 2 of the Sherman antitrust act with reference to the trade and commerce in shoe machinery as carried on by them through the instrumentality of the United Shoe Machinery Company and certain subsidiary concerns which manufacture and lease shoe machinery under certain letters patent. (Indictment 113.)

The indictment (No. 113) contains three counts which charge the defendants as follows:

Count 1. With a combination to restrain *their own* trade and the trade of others in shoe machinery. (R. 1.)

63221—12

Count 2. With a conspiracy to restrain the trade and commerce in shoe machinery of the shoe manufacturers. (R. 23.)

Count 3. With monopolizing the trade and commerce in shoe machinery. (R. 45.)

The district court sustained demurrers to all three counts, and the United States sued out this writ of error under the criminal appeals act to review the judgment as to the first and second counts only. (R. 96.)

QUESTION INVOLVED.

This case presents, *inter alia*, the very important question whether the Sherman antitrust law is violated by the existence of either of the following conditions:

(1) A combination under one head of the capital stocks and business of three separate and independent corporations, each controlling a majority of the trade and commerce in certain machines designed and used for performing operations in the manufacture of shoes, the consolidation of which has resulted in concentrating in the hands of the defendants a dominant portion of the trade and commerce among the States in shoe machinery.

(2) Lease contracts, which have been devised and used by the defendants to extend the scope of the combination resulting from the consolidation of the three separate and independent corporations, and which, as the indictment alleges, required that any of said shoe manufacturers leasing any of such kinds of machinery be bound to use in their manufacturing

business only machines of some or all of the several other kinds aforesaid manufactured and furnished to them by said defendants, and prohibited from using any machines of any of those kinds furnished or offered to them by other shoe-machinery manufacturers, and this upon penalty of having all machinery leased to them by said defendants immediately reclaimed and taken away by said defendants and the leases thereof canceled, although the machines in question are manufactured under letters patent.

GROUNDS OF THE MOTION TO ADVANCE.

A. The defendants control practically all the trade and commerce among the States of the United States in the principal essential machines used for preparing and attaching the bottoms to the uppers of shoes. This case is of the greatest importance to shoe manufacturers, independent shoe-machinery manufacturers, and the public as users of shoes.

B. Since the indictment was found, the United States has filed its petition in equity, under the Sherman law, to dissolve the combination in question and to restrain its further acts. That suit is at issue. Before it is submitted on final hearing the questions of law involved here should be determined, so that they may be correctly applied in the civil suits.

C. Another indictment (No. 114) is pending at Boston against these same defendants charging them with monopolizing interstate trade in shoe machinery. Its sufficiency has been sustained on demurrer,

but it involves many of the same questions of law as those here involved, and the decision of those questions in this court will have, necessarily, a controlling effect on those arising in the trial of that indictment.

Notice of this motion has been served on opposing counsel, who concur in the request for advancement.

WM. MARSHALL BULLITT,
Solicitor General.

OCTOBER 15, 1912.

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INDEX.

	Page.
STATEMENT OF THE CASE	1–11
I. Analysis of the indictment	3–10
1. The relation of shoe machinery to the manufacture of shoes	3
2. Extent of the shoe industry	4
3. Condition of shoe-machinery manufacture before the combination complained of	4
(*a*) Consolidated group	4
(*b*) McKay group	5
(*c*) Goodyear group	5
4. Industry and commerce	6
5. The object of the combination and the conspiracy	6
6. The method adopted in restraining commerce	7
7. Device for evading the Sherman antitrust law	9
II. The defendants' demurrers	10
III. The opinion of the District Court	10
IV. Specification of errors	11
ARGUMENT	11–55
1. The criminal provisions of the Sherman antitrust act are constitutional	11
Northern Securities Co. v. *U. S.*, 193 U. S. 197, 401.	
Standard Oil Co. v. *U. S.*, 221 U. S. 1, 69.	
U. S. v. *Kissel*, 218 U. S. 601.	
U. S. v. *Swift*, 188 F. R. 92.	
2. The lower court's construction of the indictment is not open to review here	11
U. S. v. *Biggs*, 211 U. S. 507.	
U. S. v. *Keitel*, 211 U. S. 370.	
U. S. v. *Kissel*, 218 U. S. 601.	

ARGUMENT—Continued. Page.

3. Individuals are criminally liable for acts done through the instrumentality of a corporation which they actively procure to be done 12
   Balliet v. *U. S.*, 129 F. R. 689.
   Crall v. *Com.*, 103 Va. 855, 859, 860.
   Fitzsimmons v. *U. S.*, 156 F. R. 477, 481.
   Foster v. *U. S.*, 178 F. R. 165, 173, 176–178.
   La Société Anonyme, etc., v. *Panhard Motor Co.* (1901), 2 Ch. 513, 516, 517.
   People v. *Clark*, 8 N. Y. Crim. Rep. 179, 194, 195, 212.
   People v. *White Lead Works*, 82 Mich. 471, 479.
   People v. *Duke*, 44 N. Y. Supp. 336, 337–339.
   State v. *Great Works, etc., Co.*, 20 Me. 41.
   U. S. v. *Swift*, 188 F. R. 92.
   U. S. v. *McAndrews & Forbes Co.*, 149 F. R. 823.
   U. S. v. *Durland*, 65 F. R. 408, 415; S. C., 161 U. S. 306.
4. The defendants were engaged in interstate commerce 12

FIRST POINT. The combination of the three groups of defendants into one group acting under the name of the United Shoe Machinery Co. constituted a combination and conspiracy in restraint of trade in violation of the Sherman antitrust law 13–33

1. The individual defendants and not the corporations are charged with the commission of the acts in question 15
2. Condition of the trade in shoe machinery *before* February 7, 1899 15
   (*a*) Analysis of competition then existing 16
   (*b*) There were 24 possible choices for the selection of machinery prior to the combination 17–18

FIRST POINT—Continued.

Page.

3. Condition of trade in shoe machinery *after* February 7, 1899 19
   - (*a*) Analysis of competition 19
   - (*b*) The possible choices in the selection of shoe machinery were instantly reduced from 24 to 16 20–21
4. The system of "tying" leases adopted by the defendants and its effect upon competition 22
   - (*a*) The possible choices of shoe machinery were now reduced from 24 to 2 22
5. The combination of from 70% to 80% of all the shoe-machinery business of this country into one hand is in itself so great a proportion of the entire business as to constitute a restraint of trade within the meaning of the Sherman antitrust law 23–33

   Standard Oil Co. v. *U. S.*, 221 U. S. 1, 75.
   Standard Sanitary Mfg. Co. v. *U. S.* 226 U. S. —.
   Swift v. *U. S.*, 196 U. S., 375.
   U. S. v. *American Tobacco Co.*, 221 U. S. 106.
   U. S. v. *Union Pacific R. R. Co.*, 226 U. S. —.
   U. S. v. *St. Louis Terminal*, 224 U. S. 383, 398.
   U. S. v. *The Reading Co.*, 226 U. S. —.

SECOND POINT. The system of "tying" leases adopted by the defendants is in direct restraint of interstate trade and commerce, and is not authorized by the patent laws of the United States 34–55

1. It reduced from 24 to 2 the number of choices which a customer would have for supplying his factory with shoe machinery 34

   Montague v. *Lowry*, 193 U. S. 38, 46.
   Standard Sanitary Mfg. Co. v. *U. S.* 226 U. S. —.
   U. S. v. *Union Pacific R. R. Co.*, 226 U. S.
   U. S. v. *St. Louis Terminal*, 224 U. S. 383.
   U. S. v. *The Reading Co.*, 226 U. S. —.

SECOND POINT—Continued. Page.

2. The patent laws do not authorize the "tying" clause.......... 44–55

(*a*) *Henry* v. *Dick Co.*, 224 U. S. 1, related only to supplies to be used in direct connection with the patented machine. 44

(*b*) The doctrine of *Henry* v. *Dick Co.* should not be extended to include conditions bearing no direct relation to the operation of the patented machine... 47

Standard Sanitary Mfg. Co. v. *U. S.*, 226 U. S. —.

3. Irrespective of the validity of the "tying" clause in a specific case, it is clear that the concerted action in the universal adoption of the "tying" clause brings these unified tactics within the prohibitions of the Sherman law.......... 50

Henry v. *Dick Co.*, 224 U. S. 1.

Standard Oil Co. v. *U. S.*, 221 U. S. 1.

Standard Sanitary Mfg. Co. v. *U. S.* 226 U. S. —.

U. S. v. *American Tobacco Co.*, 221 U. S. 106.

U. S. v. *St. Louis Terminal*, 224 U. S. 383.

U. S. v. *Union Pac. R. R. Co.*, 226 U. S. —.

U. S. v. *The Reading Co.*, 226 U. S. —.

U. S. v. *Trans-Mo. Freight Assn.*, 166 U. S. 290, 337.

U. S. v. *Joint Traffic Assn.*, 171 U. S. 505, 571.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 620.

UNITED STATES, *Plaintiff in Error*,
v.
SIDNEY W. WINSLOW,
EDWARD P. HURD,
GEO. W. BROWN,
WM. BARBOUR, and
ELMER P. HOWE, *Defendants in Error*.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

The question involved is whether the method of business carried on by the defendants (who combined their separate businesses under the nominal guise of a corporation known as United Shoe Machinery Co. and certain subsidiary corporations), and especially their system of leasing patented machines,

are violations of the Sherman antitrust law (act July 2, 1890, 26 Stat. 209).[1]

The United States indicted Sidney W. Winslow and four associates in three counts for engaging in a combination and conspiracy in restraint of trade. (Indictment No. 113; R., 1–48.)

The District Court (Putnam, J.) sustained demurrers to all three counts, holding, *first*, that the first and second counts did not state a case within the meaning of the antitrust act (R., 71, 72, 95); and, *second*, that the third count was bad for duplicity and repugnancy. (R., 81, 82, 94).[2]

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[1] The system of leases attacked is the so-called "tying" system, by which the holders of various patented machines first combine and then lease each machine under a stipulation that it shall only be used on condition that certain other machines owned by the combination are also used; so that a man using one machine is compelled to lease from the combination all the others necessary in his business and is prohibited from using any other kind of machine.

[2] There were two indictments, Nos. 113 and 114. The opinion deals chiefly with No. 114, and therefore its statements and arguments frequently do not apply to No. 113, which alone is here involved. This explanation is necessary lest the court be misled into thinking that the opinion in the record (p. 73–95) is always dealing with the counts now under review.

The lower court held indictment No. 113 (all counts) and indictment No. 114 (second count) bad, and thus left as good only No. 114 (first count).

The United States could not appeal as to the third count of No. 113, as the decision there was merely on the construction of the indictment, and hence not within the Criminal Appeals Act.

So the only matter under review here is the sufficiency of counts 1 and 2 of indictment No. 113.

The United States sued out this writ of error under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246. (R., 69).

The theory of the indictment is that the various individual defendants did the acts complained of, but did them through the device and instrumentality of corporations whose actions they controlled and directed and of which they (defendants) were the officers and moving spirits.

STATEMENT OF THE CASE.

The indictment charged the defendants with having engaged in,

Count 1.—A combination in restraint of the trade and commerce of the defendants themselves (R., 19, 23).

Count 2.—A conspiracy in restraint of the trade and commerce of the shoe manufacturers of this country. (R., 40, 42, 45.)

Exactly the same facts were set out in each count with only such formal variation in language as was necessary to allege (1) a *combination* to restrain the defendants' trade, and (2) a *conspiracy* to restrain the trade of the *shoe manufacturers.*

Therefore one statement of the facts will suffice for both counts.

The indictment alleged the following facts (R., 1–45):

1. *The relation of shoe machinery to the manufacture of shoes.*—For the last 25 years practically all the shoes worn in the United States have been manufac-

tured by the use of four groups of shoe machinery, to wit,

1. Lasting machines,
2. Welt-sewing and outsole-stitching machines,
3. Heeling machines,
4. Metallic fastening machines,

each group of machines performing a different and indispensable operation in the manufacture of shoes, and each group consisting of a great variety of machines. (R., 1.)

2. *Extent of the shoe industry.*—Shoes are articles of absolute necessity. There are 1,300 factories scattered through 34 States where shoes are made by such machinery, and because such machinery is protected by patents and is very expensive to manufacture the shoe manufacturers have for the past 25 years had to obtain their machinery principally from the defendants.[1] (R., 2, 16.)

3. *Condition of shoe machinery manufacture before the combination complained of.*—Prior to February 7, 1899, the manufacture of shoe machinery was distributed between several distinct groups of makers, as follows:

Consolidated group.—The defendants, Winslow, Hurd, and Brown, as directors and large stockholders in the Consolidated and McKay Lasting Machine Co. (hereafter called the Consolidated group), were "actively engaged in the management and control

[1] The indictment gives the names of the places where the factories are located and a partial list of the shoe manufacturers thereat. (R., 2–15.)

of its business" and "under the name and through the instrumentality" of that company were carrying on the manufacture of

60 per cent of all the *lasting* machines

in this country. (R., 16, 17.)

McKay group.—The defendant, Storrow, as director and large stockholder in the McKay Shoe Machinery Co., similarly controlled that company and manufactured

70 per cent of all the *heeling* machines, and
80 per cent of all the *metallic-fastening* machines

in this country. (Id.)

Goodyear group.—The defendants, Barbour and Howe, as directors and large stockholders in the Goodyear Shoe Machinery Co., similarly controlled that company and manufactured

80 per cent of all the *welt-sewing* and outsole-stitching machines, and
10 per cent of all the *lasting* machines

in this country.[1] (Id.)

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[1] It will be observed that the charge is *not* that the *companies* were doing the business, but that through the instrumentality of the various corporations *these defendants as individuals* were manufacturing shoe machinery, the extent of which may be summarized as follows:

70 per cent of all lasting machines;
80 per cent of all welt-sewing and outsole-stitching machines;
70 per cent of all heeling machines;
80 per cent of all metallic-fastening machines;

which were all the machines used in shoemaking; and thus *collectively* these defendants controlled between 70 per cent and 80 per cent of the entire shoe machinery business in the United States.

Each of the above groups of defendants was separate and independent from the others; each carried on its own trade free from any self-imposed restraint and free from any control or restraint from the other groups as to whether the machines should be sold or leased, as to the prices or rentals, the number of machines to be sold or leased, the terms of the leases, or as to the customers to whom they should sell or lease. In short, they were absolutely independent business units, and were noncompeting except to the extent that the Goodyear group, making 10 per cent of the lasting machines, was a competitor of the Consolidated group, which made 60 per cent of the lasting machines.

4. *Interstate trade and commerce.*—The manufacture of the machinery was all in Massachusetts, but the defendants were engaged in shipping the shoe machinery so made to shoe manufacturers in thirty-three other States, under contracts of sale and lease, and were engaged in interstate commerce (R., 18); and the shoe manufacturers in such States were likewise engaged in interstate commerce (R., 40).

5. *The object of the combination* (count 1) *and of the conspiracy* (count 2).—The defendants engaged in a combination and conspiracy in restraint both of their own trade and that of the shoe manufacturers for the purpose of giving to each group a power and control over interstate commerce not permitted by letters-patent, and which could not be obtained by the groups acting separately; and all to the end of raising the prices of shoe machinery, discouraging inven-

tions, and preventing others from furnishing shoe machinery in competition with the defendants. (R., 19, 41.)

6. *The method adopted in restraining commerce.*—On February 7, 1899, the defendants organized the United Shoe Machinery Co., a New Jersey corporation, and of which they all became and still are directors and members of the executive committee; Winslow became its president, and Hurd, Brown, and Barbour its vice presidents, and have so continued until now. (R., 20.)

The *defendants* have at all times been "in the active *management* and *control* of the business affairs of said United Shoe Machinery Company." (R., 21.)

The various groups of defendants thereupon severally *turned over* to said United Shoe Machinery Co., and *caused* it to occupy, take over, and hold *the capital stocks and business* [N. B.—The possession, but not the legal title, to the real estate or tangible assets] of the Consolidated and McKay Lasting Machine Co., McKay Shoe Machinery Co., and the Goodyear Shoe Machinery Co., in the names of which they (the defendants) had previously carried on the aforesaid business, interstate trade, and commerce; and the defendants have ever since continued to manage, control, and conduct, in the name and through the instrumentality of said United Shoe Machinery Co. and certain subsidiary corporations organized or purchased by the defendants, all the interstate business

that had previously been independently carried on by the three different groups of defendants.[1]

The defendants, in carrying on the business previously carried on by them in separate groups, now ceased to sell any shoe machinery to shoe manufacturers, but confined themselves to *leasing* the machinery to shoe manufacturers under a new form of oppressive lease containing the so-called "tying" clause, whereby any shoe manufacturer leasing any one kind of machine was compelled to use no other machine of any kind in his business except such as he obtained from the defendants upon penalty of having his lease canceled and all the machines leased from

[1] The precise language of the indictment is (R., 20, 21):

"All of said defendants have, since the organization of said United Shoe Machinery Company and down to the day of the finding and presentation of this indictment, together continued in the active management and control of the business affairs of said United Shoe Machinery Company; and said groups of defendants thereupon severally turned over to said United Shoe Machinery Company, and caused that corporation to accept, take over, and hold, the capital stocks and business of the three corporations in the names of which they had before carried on said business, trade and commerce as aforesaid, and said defendants, ever since, have together continued to manage, control, and conduct, in the name and through the instrumentality of said United Shoe Machinery Company and in the names of divers other corporations and concerns subsidiary to said United Shoe Machinery Company, some of which have been from time to time organized, and others purchased, for that purpose, by said defendants, all the business so as aforesaid before independently carried on by said three groups of defendants, including the interstate business, trade, and commerce aforesaid.

"And said defendants * * * have ceased to sell any of such shoe machinery to said shoe manufacturers; have con-

defendants taken away, which provisions in the leases the defendants have rigidly enforced.

For example, if a shoe manufacturer leased a *lasting* machine from the defendants and then attempted to use a *metallic* fastening machine made by some *independent* concern, the defendants would cancel the lease and take away the *lasting* machine; and the defendants' policy was to furnish no machinery again to anyone who had once violated the "tying" clause of their lease.

7. *Device for evading the Sherman antitrust law.*—The organization by the defendants of the United Shoe Machinery Co., the turning over to and the acceptance by it of the capital stocks and business of the three corporations (through whom the several

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fined themselves to leasing the same to such shoe manufacturers upon written leases containing certain onerous and oppressive provisions not found in their former leases—that is to say, provisions whereby any of said shoe manufacturers leasing any of such kinds of machines have been bound to use in their manufacturing business only machines, of some or all of the several other kinds aforesaid, furnished to them by said defendants, and were prohibited from using any machines, of any of those kinds, furnished or offered to them by other shoe-machinery manufacturers, and this upon penalty of having all machines leased to them by said defendants immediately reclaimed and taken away by said defendants and the leases thereof canceled, if they violated such prohibition; and have continually and persistently arbitrarily enforced said onerous and oppressive provisions, by all the means in their power, as against said shoe manufacturers, and made it their general policy and practice to refuse to furnish to them such shoe machinery, and to otherwise injure in every way they could, all shoe manufacturers who have failed to comply with the terms or spirit of said onerous and oppressive provisions in said leases."

groups of the defendants had previously carried on their respective businesses), was simply a means of combining the interstate commerce in trust in violation of the Sherman law.

The defendants' demurrers.

The defendants demurred to the first and second counts on seventy-six grounds, which may be summarized as follows (R., 49–63):

I. That the acts charged are insufficiently pleaded, because of (a) inconsistencies and repugnancies, and (b) uncertainty and lack of particularity.

II. That the criminal provisions of the Sherman antitrust law are void for vagueness and uncertainty.

III. That the acts charged do not constitute any offense under the Sherman law.

The opinion of the District Court.

The District Court (Putnam, J.) sustained the constitutionality of the act (R., 78, 79), and held that there was no merit in the numberless objections as to the inconsistency, repugnancy, and vagueness of the indictment. (R., 76, 78, 80.)

The court, however, held that the acts charged did not constitute a violation of the Sherman law, apparently [1] upon the ground that the formation of the

[1] We say "apparently" because the opinion below deals with indictment No. 114 (which is not in the record, and whose allegations are quite different from indictment No. 113, here involved); and yet curtly dismisses indictment No 113. "for the same reason." (R., 94.)

United Shoe Machinery Co. was purely an economic arrangement, not in violation of any rule in restraint of trade and in strict and normal compliance with modern trade progress. (R., 91.)

SPECIFICATION OF ERRORS.

The District Court erred in sustaining demurrers to the first (combination) count and to the second (conspiracy) count of the indictment and in thereby holding that the facts set out did not constitute an offense in violation of section 1 of the Sherman antitrust law (Assignment of Errors; R., 96–97).

ARGUMENT.

1. The constitutionality and sufficiency of the criminal provisions of the Sherman antitrust act are too well settled to justify, at this late day, any extended argument to sustain them. (*U. S.*, v. *Kissel*, 218 U. S. 601; *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 401; *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 69; *U. S.* v. *Swift*, 188 F. R. 92.)

2. The many questions which were raised below as to the alleged inconsistencies, repugnancies, indefiniteness, and uncertainties of the indictment are obviously mere matters of the construction of its language, and hence are not open to review under the Criminal Appeals Act (*U. S.* v. *Kissel*, 218 U. S. 601; *U. S.* v. *Biggs*, 211 U. S. 507; *U. S.* v. *Keitel*, 211 U. S. 370); and in any event the criticisms of the indictment are so patently hypercritical that the

plain language of the indictment is sufficient to refute them; and the lower court so held. (R., 76-80.)

3. It is well settled that individuals are criminally liable and subject to indictment for acts done in corporate form where the individuals themselves personally do or procure to be done such things; and it is no objection to the indictment that it alleges that the defendants did the acts complained of in the name of and through the instrumentality of a corporation. (Rec., p. 76; *U. S.* v. *Swift*, 188 F. R. 92, 98; *U. S.* v. *McAndrews & Forbes Co.*, 149 F. R. 823; *Crall* v. *Com.*, 103 Va. 855, 859, 860; *People* v. *Clark*, 8 N. Y. Crim. Rep. 179, 194, 195, 212; *People* v. *White Lead Works*, 82 Mich. 471, 479; *People* v. *Duke*, 44 N. Y. Sup. 336, 337-339; *State* v. *Great Works, &c. Co.*, 20 Me. 41; *U. S.* v. *Durland*, 65 F. R. 408, 415; S. C., 161 U. S., 306; *Balliet* v. *U. S.*, 129 F. R. 689; *Fitzsimmons* v. *U. S.*, 156 F. R. 477, 481; *Foster* v. *U. S.*, 178 F. R. 165, 173, 176-178; *La Société Anonyme, etc.*, v. *Panhard Motor Co.* (1901), 2 Ch., 513, 516-517.)

4. The defendants were engaged in interstate trade and commerce, for the indictment expressly alleges that the defendants manufactured shoe machinery in Massachusetts alone and "shipped the shoe machinery so manufactured by them to the shoe manufacturers aforesaid at the said several places of manufacture of said shoe manufacturers throughout the United States," to wit, to 1,300 factories in 34 States; and the fact that the shipments to the various States were made in pursuance of leases, instead of absolute

sales, is immaterial, and the lower court so held. (Rec., 80; *U. S.* v. *The Reading Co.* 227 U. S. —.)

5. The real question involved is whether the Sherman antitrust law reaches the acts of the defendants; and that resolves itself into two points, as follows:

SUMMARY OF POINTS DISCUSSED.

1. The combination of the three groups of defendants into one group acting under the name of the United Shoe Machinery Co. constituted a combination and conspiracy in restraint of trade in violation of the Sherman antitrust law.

2. The system of "tying" leases adopted by the defendants is in direct restraint of interstate trade and commerce, and is not authorized by the patent laws of the United States.

FIRST POINT.

The combination of the three groups of defendants into one group acting under the name of the United Shoe Machinery Co. constituted a combination and conspiracy in restraint of trade in violation of the Sherman antitrust law.

In the consideration of modern industrial developments in the light of the *Standard Oil* and *American Tobacco* cases, the question is not whether this or that contract or act, *isolatedly viewed*, is such an unreasonable restraint of trade as would have been bad at common law, but rather whether the acts, contracts, agreements, or combinations, viewed as a whole in relation to the trade and commerce with which they

deal, operate to the prejudice of the public interests by unduly restricting competition, or by unduly obstructing the due course of trade, or which injuriously restrain trade, and therefore come within the scope of the remedial purposes of the act; and in the consideration of that question there should be such a reasonable construction of the act as will not interfere with the power to make normal and usual contracts to further trade by resorting to all normal methods, by agreement or otherwise, to accomplish such purpose; and yet which will reach any scheme or device, no matter how cleverly disguised, the effect of which would be to bring about those evils which it was the purpose of the act to prevent. (*U. S.* v. *Reading Co.*, 226 U. S. —.)

The law seems to be settled that the antitrust act will reach any conceivable scheme or device which, taken as a whole, comes within the spirit or purpose of the prohibitions of the act, which prohibitions are directed against all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restrain-

ing the free flow of commerce and tending to bring about those evils, such as enhancement of prices, which were considered to be against public policy. (*U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. —.)

In *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. —, the court said:

> The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the play of competition in the conduct thereof.

In the light of those principles, how shall the combination here involved be viewed?

1. *The individual defendants, and not the corporations, are charged with the commission of the acts in question.* It is important to bear always in mind that the indictment charges, not that the corporations, but that the *individual defendants* did the alleged acts; and while doing them in the name and through the instrumentality of corporations, which they managed, controlled, and directed, still the charge is that the *defendants as individuals* (or groups of individuals) did the things alleged. (For authorities, see p. 12, *supra*.)

2. *Condition of the trade in shoe machinery before February 7, 1899.*—Each group of defendants controlled a large majority (varying from 60 per cent to 80 per cent) of the business in the manufacture of some particular group of shoe machinery; but as each group of machinery related to a distinct department of the manufacture they were noncompetitive

with each other (except between the Consolidated group and the Goodyear group as to lasting machines only).

Whether any group of defendants was in itself a combination in violation of the antitrust act by reason of having theretofore acquired so large a control (60 per cent to 80 per cent) of one distinct but indispensable branch of shoe machinery presents an interesting question, but it is not directly involved in the present case.

The competition existing before February 7, 1899, may be thus summarized:

Character of machine.	Competitors.	Amount of trade controlled.
		Per cent.
Lasting	Consolidated	60
	Goodyear	10
	Independents	30
Heeling	McKay	70
	Independents	30
Metallic fastening	McKay	80
	Independents	20
Welt sewing and outsole stitching	Goodyear	80
	Independents	20

Although the trade in each group of machines was pretty largely in the hands of one concern, still there were a good many Independents, so that there was very considerable competition in the shoe-machinery business as a whole; at least enough to give a shoe manufacturer some choice as to where he would get his machinery. Treating the Independents together as one group, he had 24 different choices for obtaining his machinery, as will be seen by the schedule on the following page.[1] The situation was one which invited concerted action and made exceedingly easy the accomplishment of any purpose to dominate the supply of shoe machinery; and if, by concert of action, the sources of what little existing competition there was be removed, the defendants acting together would have a complete monopoly. Let us see how it was done.

[1] If the Independents were treated not as one group, but as so many separate factors as there were independent manufacturers, the variety of choice would be infinitely greater (perhaps in the thousands) and the subsequent reduction of competition far more startling. But as the record does not show how many Independents there were, we treat them as a single group.

Possible choices prior to the combination.

Machines.	Choice of makers.							
	No. 1.	No. 2.	No. 3.	No. 4.	No. 5.	No. 6.	No. 7.	No. 8.
Lasting	Consolidated	Goodyear	Independents	Consolidated	Goodyear	Independents	Consolidated	Goodyear.
Heeling	McKay	McKay	McKay	McKay	McKay	McKay	McKay	McKay.
Metallic	McKay	McKay	McKay	McKay	McKay	McKay	Independents	Independents.
Welt sewing	Goodyear	Goodyear	Goodyear	Independents	Independents	Independents	Goodyear	Goodyear.
Machines.	No. 9.	No. 10.	No. 11.	No. 12.	No. 13.	No. 14.	No. 15.	No. 16.
Lasting	Independents	Consolidated	Goodyear	Independents	Consolidated	Goodyear	Independents	Consolidated.
Heeling	McKay	McKay	McKay	McKay	Independents	Independents	Independents	Independents.
Metallic	Independents	Independents	Independents	Independents	McKay	McKay	McKay	McKay.
Welt sewing	Goodyear	Independents	Independents	Independents	Goodyear	Goodyear	Goodyear	Independents.
Machines.	No. 17.	No. 18.	No. 19.	No. 20.	No. 21.	No. 22.	No. 23.	No. 24.
Lasting	Goodyear	Independents	Consolidated	Goodyear	Independents	Consolidated	Goodyear	Independents.
Heeling	Independents	Independents	Independents	Independents	Independents	Independents	Independents	Independents.
Metallic	McKay	McKay	Independents	Independents	Independents	Independents	Independents	Independents.
Welt sewing	Independents	Independents	Goodyear	Goodyear	Goodyear	Independents	Independents	Independents.

3. *Condition of the trade in shoe machinery after February 7, 1899.*—On February 7, 1899, the defendants organized the United Shoe Machinery Co. and turned over to it all the capital stocks and business of the three corporations in whose names they had been previously carrying on the business; and thereafter the defendants (now joined in one homogeneous group) carried on all the business theretofore carried on separately by the three groups. The indictment charges, not that the United Shoe Machinery Co. carried on the business but that the *defendants* collectively did it, through the instrumentality of the United Shoe Machinery Co., which they actively *controlled and directed.*

The coalescence of the three groups into one, under the name of the United Shoe Machinery Co., *eo instanti* reduced the competition as follows:

Character of machine.	Competitors.	Amount of trade controlled.
		Per cent.
Lasting	United Shoe Machinery Co.	70
	Independents	30
Heeling	United Shoe Machinery Co.	70
	Independents	30
Metallic fastening	United Shoe Machinery Co.	80
	Independents	20
Welt sewing and outsole stitching	United Shoe Machinery Co.	80
	Independents	20

Instantly the variety of choice was reduced from 24 to 16, so that where a shoe manufacturer had previously had 24 possible different ways of obtaining the machines, he was now reduced to 16 (treating the Independents as to any one class of machines as one group); and even then in 12 of the 16 choices he would have to obtain more than one kind of machine from the United Shoe Machinery Co. (See the schedule on the opposite page.)

Possible choices after the combination and without the "tying" leases.

Machines.	Choice of makers.							
	No. 1.	No. 2.	No. 3.	No. 4.	No. 5.	No. 6.	No. 7.	No. 8.
Lasting	United	Independents	United	Independents	United	Independents	United	Independents.
Heeling	United	United	Independents	Independents	United	United	United	United.
Metallic	United	United	United	United	Independents	Independents	United	United.
Weltsewing	United	United	United	United	United	United	Independents	Independents.
Machines.	**No. 9.**	**No. 10.**	**No. 11.**	**No. 12.**	**No. 13.**	**No. 14.**	**No. 15.**	**No. 16.**
Lasting	United	Independents	United	Independents	United	Independents	United	Independents.
Heeling	Independents	Independents	United	United	Independents	Independents	Independents	Independents.
Metallic	Independents	Independents	Independents	Independents	United	United	Independents	Independents.
Weltsewing	United	United	Independents	Independents	Independents	Independents	Independents	Independents.

4. *The system of "tying" leases adopted by the defendants and its effect upon competition.*—Not even content with that great elimination of competition, the defendants then adopted the "tying" system of leases, by which they further reduced competition. It must be remembered that to make a pair of shoes, four different classes of machines must be used, to wit, (1) lasting, (2) heeling, (3) metallic-fastening, and (4) welt-sewing and outsole-stitching machines. The leases provided that any shoe manufacturer using any one class of machines furnished by the defendants was compelled to use for all his other machines only those furnished by defendants; and if he used any machine made by an independent manufacturer, the defendants could forfeit his lease and remove their machines. In this way the shoe manufacturer was reduced to but two choices, to wit, (1) all four classes of machines must be furnished by the defendants, or (2) all four must be furnished by the Independents.

As the defendants controlled from 70 per cent to 80 per cent of all the shoe machinery he was compelled to take all from the defendants or all from the few Independents left in the business. It was no longer possible to use one or more machines of defendants' make and the balance of the Independents.

So that the combination reduced from 24 to 2 the possible different ways by which a shoe manufacturer could secure the necessary machinery.

In *United States* v. *Union Pacific R. R. Co.*, 226 U. S. —, it is said:

> We take it therefore that it may be regarded as settled, applying the statute as construed in the decision of this Court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable.

We submit:

I. *The combination of from 70 per cent to 80 per cent of all the shoe-machinery business of this country into one hand is in itself so great a proportion of the entire business as to constitute a restraint of trade within the meaning of the Sherman anti-trust law.*

Shoes are indispensable articles of interstate commerce, requiring for their completion four distinct operations, each performed by a distinct and different kind of machine; and until all the operations have been completed the shoe is useless and valueless.

Originally a shoe manufacturer could get all or none of his machines from the various groups of defendants, or he could get one or more from some of them and the balance from other manufacturers (which others we will call Independents).

The language in *United States* v. *St. Louis Terminal*, 224 U. S. 383, 398, with reference to the combination of different terminal systems is quite illuminating:

> But that there existed before the three terminal systems were combined a considerable measure of competition for the business of the other companies, and a larger power of competition, is undeniable. That the fourteen proprietary companies did not then have the power they now have to exclude either existing roads not in the combination, or new companies, from acquiring an independent entrance into the city, is also indisputable. The independent existence of these three terminal systems was, therefore, a menace to complete domination as keeping open the way for greater competition.

So long as each group of defendants controlled from 60 per cent to 80 per cent of the business in but *one* kind of machine and was distinct from the other groups, a shoe manufacturer was fairly free in his ability to secure machinery, for if not satisfied with the treatment accorded him by any one group of defendants, he could at least obtain that kind of machine from the Independents (or, in case of the lasting machine, from either an Independent or from either of two rival groups of the defendants); and as to the other three kinds of machines he could get them from other groups or from the Independents. In this way, even if the machines made by the respective groups of defendants were superior of their kind to those made

by the Independents, still a manufacturer could get the benefit of competition by worrying along with even an inferior machine of one kind, and then he could obtain the other kinds of machinery from other groups or from the Independents.

Therefore, despite the predominant control by the respective groups of the respective kinds of machines made by them, a fair degree of competition existed in the shoe-machinery business as a whole. No *one* group of defendants could, alone, successfully dictate arbitrary terms to the manufacturers, for each kind of machine was but one out of four essential processes, and the Independents could as to any particular machine furnish fair competition. That very fact, further, tended to foster independent competition in all *four* classes of machines, because the Independents in any and all classes could furnish machinery to customers who might be dissatisfied with the machines or with the treatment of the particular group of defendants making that class of machine; and that situation made it possible for the Independents to exist as they could obtain here and there enough business from manufacturers who (while using some of defendants' machines did not care to use all) would purchase some Independent machines.

Inasmuch as shoes are articles of such constant, general, and enormous use, and as they have to be made by three or four kinds of machinery, even a small proportion of Independents in each class could afford competition, and taken as a whole they would

furnish some reasonable competition in shoe-machinery manufacture.

The combination of the three groups into one group not only eliminated the competition previously existing between the Consolidated group and the Goodyear group as to lasting machines, but what is far more important, it no longer left three separate distinct groups respectively controlling most of the business in as many separate businesses (no one of which businesses could alone dominate the shoe-manufacturing business), but it now put from 70 per cent to 80 per cent of *all the shoe-machinery business* into one control, leaving but a fragmentary competition in the hands of the scattered Independents in the four different lines. The combination, controlling 70 per cent to 80 per cent of all the shoe-machinery business, had an enormous power as against an Independent, controlling, as he did, but a trifling part of the whole, to wit, but (*a*) a *small portion* (*b*) of 20 per cent of (*c*) one out of four kinds of machine. For instance, a very large Independent controlling (say) 50 per cent of the whole Independent business in fastening machines would control but 2½ per cent of the total shoe-machinery business, and thus the very largest Independent would be almost infinitesimal in comparison with the United Shoe Machinery Co.

But what is more, a shoe manufacturer, becoming dissatisfied with the treatment accorded him as to (say) heeling machines, and desiring to get his heeling machines elsewhere, was no longer free to do so and yet get the rest of his machines from the other

groups of defendants, unaffected by his rupture with one group. On the contrary, if he now fell out with the persons controlling the heeling machines, he was *ipso facto* falling out with the *same* persons controlling most of the lasting, metallic-fastening, and welt-sewing machines.

It is precisely that sort of effect on competitive conditions which the Sherman law was intended to prevent, for the language in *United States* v. *Union Pacific Railroad Co.*, 226 U. S. —, is peculiarly in point here:

> Competition between two such systems consists not only in making rates, which, so far as the shipper was concerned, the proof shows, were by agreement, fixed at the same figure whichever route was used and then apportioned among the connecting carriers upon a basis satisfactory to themselves, but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their revenues. The inducement to maintain these points of advantage—low rates, superiority of service and accommodation—did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by

competing owners whose success depended upon their accomplishment.

The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates (*United States* v. *Joint Traffic Association, supra*, 577). It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act. *Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 646, 676; *United States* v. *Joint Traffic Association, supra*.

The same principle is expressed in *U. S.* v. *The Reading Co.*, 226 U. S. —:

"But if the defendant carriers did, as we have found to be the fact, combine to restrain the freedom of interstate commerce either in

the transportation or in the sale of anthracite coal in the markets of other States, and adopted as a means for that purpose the Temple Company, and, through it, the control of the great Simpson & Watkins' collieries, the parts of the general scheme, however lawful considered alone, become parts of an illegal combination under the Federal statute which it is the duty of the court to dissolve, irrespective of how the legal title to the shares is held. *Northern Securities* case, 197 U. S. 244, 291. So long as the defendants are able to exercise the power thus illegally acquired, it may be most efficiently exerted for the continued and further suppression of competition. Through it, the defendants, in combination, may absorb the remaining output of independent producers. The evil is in the combination. Without it the several groups of coal-carrying and coal-producing companies have the power and motive to compete. That each may for itself advance the price of coal or cut down the production, is true. But in the power which each other group would have to compete would be found a corrective. The statute forbids the concerted action which has already brought about the strangling of a projected competing railroad and the complete control of the sale of an immense tonnage of independent coal which had prior thereto not only been a menace to their collective control of the means of transportation to New York harbor points, but a large competing factor in sales at these points. The Temple

Company, therefore, affords a powerful agency by means of which the unlawful purpose which induced its acquisition may be continued beyond the mere operation of the Simpson & Watkins' collieries."

As a practical matter, the combination into one homogeneous group or control, of four noncompetitive businesses (which, however, taken together constitute one complete business), enormously curtails the customer's liberty of action, not by eliminating competition between the groups, for they were noncompetitive, but by compelling the customer to deal with one and the same group as to all four classes of machinery, whereas formerly he could deal with three ~~four~~ separate groups. Formerly, a disagreement with the chief manufacturer of one machine affected only that one element in the business, and left one free to go to an independent manufacturer for that one element; but now one such a disagreement meant a disagreement with the controlling manufacturer of every class of machine used in the shoe business. As aptly said by Mr. Justice Day only the other day:

> While the law may not be able to enforce competition, it can reach combinations which render competition impracticable (*U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. ——).

The answer of the lower court (R. 91, 92) "that the combination of various elements of machinery, all relating to the same art and the same school of manufactures, for the purpose of furnishing any

customer, the whole or any part of an entire system, is in strict and normal compliance with modern trade progress," and that "it is absolutely normal, and in accordance with the rightful demand of the market, for any dealer to supply mere details or an entire system of machinery, according as his customers may desire," may be true when applied to a combination that is not dominant and does not in effect monopolize the field; *but it is wholly untrue* when thereby trade is unduly restrained or a monopoly created. Indeed, the original consolidation of from 60 per cent to 80 per cent of any one given class of machinery into one group was probably itself an unlawful combination in restraint of trade as tending to throttle competition, but how much more serious it becomes when three ~~four~~ such controlling groups combine into *one* group.

So we face the question whether a combination into one group of about 75 per cent of the whole business of the country is such a combination in restraint of trade as to violate the Sherman law.

In *Swift* v. *United States*, 196 U. S. 375, the control there condemned was of but 60 per cent of the total trade.

In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. —, it was held that a "scheme established by the co-operation of 85 per cent of the manufacturers" of enameled ware was in violation of the act.

In *Standard Oil Co.* v. *United States*, 221 U. S. 1, 75, it was held that the unification of power and control over the oil industry, as shown by the very size

of the combination, in and of itself created a *prima facie* presumption of an intent to obtain an illegal dominancy over that industry.

In *United States* v. *American Tobacco Co.*, 221 U. S. 106, it was held that the gradual absorption of control over the greater proportion of the tobacco industry in the United States constituted a restraint of trade, but such control was not as great as in the case at bar.

Without reviewing all the cases decided under the act (each depending more or less upon the particular facts involved), it is sufficient to say that any arrangement is condemned whose effect is to put into one combination an undue control over interstate commerce in any article; and from the considerations above reviewed it seems plain that a progressive scheme by which about 80 per cent of a great trade is put into one hand is an undue restraint on the play of normal competitive forces.

The action of the defendants in forming the United Shoe Machinery Co. was alone (and without any consideration whatever of the system of leases subsequently adopted) such a combination as to be in violation of the antitrust act.

In order that there may be no possible room for misapprehension of the Government's position on this point, we freely concede that it would be entirely proper and, in the language of Judge Putnam (Rec., 91–92), "in strict and normal compliance with modern trade progress" to form a "combination of various elements of machinery, all relating to the

same art and the same school of manufactures, for the purpose of constructing economically and systematically, and of furnishing any customer, the whole or any part of an entire system," in order "for any dealer to supply mere details or an entire system of machinery, according as his customers may desire," *provided the combination was of only a reasonable proportion of the total trade;* and if a corporation (formed by the consolidation of several companies each owning a different class of machinery) made every class of machinery (but its total control was only (say) 25 per cent of the total trade) it would doubtless be a normal trade development. But without attempting now to determine exactly at what percentage of trade control a corporation passes into the region of illegal restraint, certainly when the combination acquires 80 per cent of the total trade the line between legal and illegal combinations has been passed.

In conclusion, therefore, of this branch of our argument we insist that the consolidation into one hand of about 80 per cent of the total trade in shoe machinery (the remaining 20 per cent not even being consolidated as to the different classes of machines, but widely scattered between persons making but one class of machine) is in and of itself a combination in restraint of trade and illegal.

SECOND POINT.

The system of "tying" leases adopted by the defendants is in direct restraint of interstate trade and commerce, and is not authorized by the patent laws of the United States.

If any doubt remained as to the combination being in restraint of trade, it would be dispelled by a consideration of the "tying" clause.

As soon as the combination was formed, a new system of lease was adopted by which every shoe manufacturer desiring to use any *one* kind of machine controlled by the defendants was bound to agree that he would use all the other kinds of machines controlled by it and would use none other. (R., 21–22; 43–44.)

That was as clearly a contract in restraint of trade as could be imagined. It was an additional step in furtherance of the general scheme of combination devised by the defendants. By that scheme the possible competition in the supply of shoe machinery was *reduced* from *twenty-four* ways before 1899 to *two* ways under the defendants' combination.

Is that not in restraint of trade?

A. If it be suggested that the former competition between the Consolidated and Goodyear groups related only to one (lasting) out of four machines, we reply that such one machine, however, was an absolutely indispensable factor in the manufacture of shoes; and again the language in *United States* v. *Union Pacific Railroad Co.*, 226 U. S. —, is in point:

> It is urged that this competitive traffic was infinitesimal when compared with the gross

amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected.

B. For example, the Consolidated group that had formerly sold *lasting* machines in competition with the Goodyear group, was now in a combination that required anyone using its *lasting* machine *to agree to use* only the Goodyear *welt* machine. Formerly the Consolidated, being a competitor with the Goodyear in *lasting* machines, would gladly see its customers use Independent *welt* machines, so as not to help its rival, the Goodyear; but after the combination it would not lease *its* lasting machines save on condition that its customer would use, and only use, the *welt* machine of its late rival, the Goodyear group.

C. The "tying" clause was a direct restraint upon the freedom of contract and competition (1) of each of the three groups with reference to their interstate trade, for it limited their trade to those who would agree to use only the machines of the combination, and (2) of the customers, for it deprived them of their right to obtain one class of machine they did want unless they agreed to use another machine they did not want, and (3) of the Independents, for it deprives (say) an Independent welt-sewing machine maker of his previous well-satisfied customers, because they needing (for example) the Consolidated lasting machine were unwillingly compelled to abandon the Independent welt-sewing machine and use the Goodyear machine in order to have the right to use the Consolidated lasting machine. These results were brought about solely by the power of the combination of the three groups into one, thus giving enormous effect to the unified tactics, which is the very thing which the law condemns.[1]

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[1] Since writing this brief our attention has been called to the "Report of Board of Investigation established under the Combines Investigation Act" of Canada, where the business of the United Shoe Machinery Co. of Canada was under investigation. The same system of "tying" leases was adopted, and in condemning it as illegal the report (after calling attention to the fact that, while prior to 1899 a shoe manufacturer had several sources from which to obtain machinery, since then the company supplied 138 out of 145 manufacturers in Canada) said:

"The practical result of the system is to compel the manufacturer of boots and shoes to take the complete equipment for his factory from the company, because the auxiliary machines are tied to the main machines of their class, and the

The principles controlling three prior cases in this court are decisive here.

In *Montague* v. *Lowry*, 193 U. S. 38, 46, an association of manufacturers and dealers in tiles was

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main machines of each class are tied to the main machines of the other classes. To illustrate: It will be noticed from the table that if a shoe manufacturer desires to use one of the pulling-over machines, that machine can only be had on condition that it will be employed exclusively upon materials which have been or are to be treated upon the company's welters, stitchers, lasting, pegging, metallic, heeling and pulling-over auxiliary machines. * * *

"We have now to consider what is the effect of the situation so established upon (1) competition in the manufacture and the supply of shoe machinery; (2) the position of manufacturers of boots and shoes; (3) the consumers of boots and shoes.

"The only complaint of shoe manufacturers, when they complain, is that they are deprived of such advantages as might accrue to them if they were free to avail themselves of the benefit of competition in the supply of shoe machinery. They do not complain of the company's charges, as all shoe manufacturers are, in that respect, on the same footing and they all incorporate the charge made upon them for royalties in the factory cost of their shoes. * * *

"Where a manufacturer whose factory is equipped with machines obtained from outside sources wishes to use important machines leased by the company, he can only do so on abandoning his other machines, and the company has invariably, in practice, enforced this condition.

"With the conditions thus found to be in existence, competition in the manufacture and supply of shoe machinery in Canada is practically impossible. * * *

"The United Shoe Machinery Co. of Canada is a combine and by the operation of the clauses of the leases, quoted in the foregoing, which restrict the use of the leased machines in the way therein set forth, competition in the manufacture, production, purchase, sale, and supply of shoe machinery in Canada has been and is unduly restricted and prevented."

condemned because it restrained its members from selling tiles to nonmembers; or, stated conversely, it prevented a tile dealer in San Francisco from procuring tiles either from the manufacturers he had been accustomed to deal with or (except at an increased price) from local dealers unless he joined the association.

This court said (p. 45):

> The agreement, therefore, restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enhanced prices to the non-member as already stated.

So here there is an association which narrows the market for machinery so it can be leased only to those who will agree to use a certain set of machines, which bear no relation to each other except that of belonging to the same lot of persons, and prevents a customer from getting one kind of machine unless he will use certain others.

In *United States* v. *St. Louis Terminal*, 224 U. S. 383, a number of railway terminal facilities were unified by absorption into one corporation controlled by certain railroads, which used the facilities freely and permitted other roads to use them on almost, if not quite, equal terms. Several bridges afforded free access to St. Louis; but owing to the physical or topographical conditions existing at St. Louis there was no room for the construction of further

terminals, and it was impossible for other railroads to pass from the St. Louis end of the bridges to the industries of the city except over the consolidated terminals. It was held that the unification of the terminals was an unlawful combination in restraint of trade because of the power (whether actually exercised or not) it gave the combination to say to independent roads that they could not enter St. Louis save on the terms imposed by the combination. The court said (p. 394, 395):

> We come, then, to the question upon which the case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the Anti-trust Act?
>
> Whether it is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the act of Congress, as construed and applied by this court in the cases of *The Standard Oil Company* v. *The United States*, 221 U. S. 1, and *The United States* v. *American Tobacco Company*, 221 U. S. 106, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted.

The principle is that any sort of combination which enables it, by virtue of the force derived

from co-operation, to limit to an undue degree the activities of others is illegal.

In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. —, contracts whereby manufacturers of enameled ware agreed not to sell to jobbers unless they agreed not to sell to plumbers except at certain prices were held to be illegal, the court saying:

> Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer.

The principle underlying all these cases is that where a number of persons combine and thereby obtain a power (greater than any one possessed singly) to compel others to deal or not to deal on terms to be fixed by the combination, then the combination is illegal if, on looking at it broadly, it

appears that the control so secured is undue. It is left for the court to say in each case by the light of reason whether the contract is undue or only incidental to the usual and normal development of competitive trade.

Summing up the situation, we have three disconnected groups of men, *each* controlling a dominant portion of *one* essential element in the business of shoe machinery, which in turn is essential to the manufacture of shoes. *Together* these groups control a dominant portion of *every* element in the shoe-machinery business. They pool their interests by each transferring the control of its business to the United Shoe Machinery Co., which the groups of individuals, now coalesced into one unified group, control and direct.[1] Thereby the dominant portion of the manufacture, sale, and lease of *every* kind of machinery essential in shoe manufacture is placed in the

[1] Some criticism was made by defendants' counsel below upon what they termed the repugnancies and inconsistencies in relation to the transfer to the United Shoe Machinery Co. The Government offers no excuse for, but stands firmly on, the allegations as made. It asserts the *defendants* did all the acts. Their method was (1) to transfer the capital stocks of the three original companies to the United Shoe Machinery Co., (2) to turn over also the business (i. e., possession, control, management, good will, etc.) of those three companies to the United Shoe Machinery Co., and (3) to leave the three original companies in existence as mere naked holders of title to such tangible property as was used, as a cloak to shield under if attack were made on the United Shoe Machinery Co. as a monopoly—a very clever scheme; feasible only because of the absolute control which the defendants had over the whole business.

control of *one unified combination of men*, to wit, these defendants.

They then adopt contracts which prevent a customer (who previously had no difficulty in getting any machine from one of the defendants) from obtaining the machine unless he would agree to terms that could only be imposed by virtue of the power of combination; and as these terms cover 80 per cent of the total business in shoe machinery do they not unduly restrain trade and curtail free competition?

The most recent declaration of this court in *U. S. v. The Reading Co.*, 226 U. S. —, is quite in point.

> Before these contracts there existed not only the power to compete but actual competition between the coal of the independents and that produced by the buying defendants. Such competition was after the contracts impracticable. It is, of course, obvious that the law may not compel competition between these independent coal operators and the defendants, but it may at least remove illegal barriers resulting from illegal agreements which will make such competition impracticable.
>
> Whether a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But

when there is only a probability, the intent to produce the consequences may become important: *United States* v. *St. Louis Terminal Association*, 224 U. S. 383, 394; *Swift & Co.* v. *United States*, 196 U. S. 375.

In the instant case the extent of the control over the limited supply of anthracite coal by means of the great proportion theretofore owned or controlled by the defendant companies, and the extent of the control acquired over the independent output which constituted the only competing supply, affords evidence of an intent to suppress that competition and of a purpose to unduly restrain the freedom of production, transportation and sale of the article at tide-water markets.

The case falls well within not only the *Standard Oil* and *Tobacco* cases, 221 U. S. 1, 106, but is of such an unreasonable character as to be within the authority of a long line of cases decided by this Court. Among them we may cite: *Northern Securities Company* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375; *Natural Oil Company* v. *Texas*, 197 U. S. 115; *United States* v. *St. Louis Terminal Association*, 224 U. S. 383, and the recent case of *United States* v. *Union Pacific Railway, et al.*

THE PATENT LAWS DO NOT AUTHORIZE THE "TYING" CLAUSE.

The defendants contend that the "tying" clauses are legitimate restrictions upon the use of a patented machine under the patent laws which grant to the patentee (Rev. Stat. 4884)

> the exclusive right to make, use, and vend the invention or discovery throughout the United States.

The patent laws do not grant to the patentee any *new* rights, but they merely *exclude others* from making, using, or vending the thing patented without the permission of the patentee. (*Bloomer* v. *McQuewan*, 14 How. 539, 548; *Paper Bag Patent Case*, 210 U. S. 405, 424, 425; *Henry* v. *Dick Co.*, 224 U. S. 1, 28.)

The right of the patentee to sell, use, or to contract concerning the patented article is not derived from the patent law but from the general law and is governed thereby; but as an incident to his *right* (derived from the patent law) *to exclude the others* from the use of his invention he has the power to prescribe restrictions upon such use. (*Mitchell* v. *Hawley*, 16 Wall. 544; *Cotton Tie Co.* v. *Simmons*, 106 U. S. 89; cases cited in footnote to *Henry* v. *Dick Co.*, 224 U. S. 1, 38.)

1. In *Henry* v. *Dick Co.*, 224 U. S. 1, it was for the first time decided that the patentee had the power to impose as a restriction upon the use of his invention that it should be used only with certain specified unpatented articles. It was there held by less than a

majority of the full court (Lurton, McKenna, Holmes, Van Devanter, JJ.) that the owner of a patented mimeograph might sell it with the restriction that it should "be used only with the stencil, paper, ink," etc., made by the owner, such stencil, paper, ink, etc., being unpatented (White, C. J., Hughes, Lamar, JJ., dissenting).

In view of the narrow margin by which that case was decided, and the strong dissent accompanied by the suggestion "that the application in future cases of the construction now given be confined within the narrowest limits" (224 U. S. 50), it is desirable to bear in mind exactly what it decided.

The decision was limited to establishing the lawful right of a patentee to sell his patented machine subject to the restriction that it should be *used only with certain specific supplies necessary to be used with it* in order for the machine *to perform the functions* for which it was invented. This is readily seen from repeated expressions in the opinion:

> The meaning and purpose of this restriction was that while the property in the machine was to pass to the purchaser, the right *to use* the invention was restricted *to use with other articles required in its practical operation*, supplied by the patentee (p. 26).
>
> I will sell with the right *to use only with other things proper for using with* the machines (p. 32).
>
> For the purpose of testing the consequence of a ruling which will support the lawfulness of a sale of a patented machine *for use* only in

> connection with supplies *necessary for its operation* bought from the patentee, many fanciful suggestions of conditions which might be imposed by a patentee have been pressed upon us (p. 34).
>
> The conclusion we reach is that there is no difference, in principle, between a sale subject to specific restrictions as to the time, place or purpose of use and restrictions requiring *a use only with other things necessary to the use of the patented article* purchased from the patentee. If the violation of the one kind is an infringement, the other is also (p. 35).

Referring to a long list of cases cited in a footnote (224 U. S. 38) dealing with license restrictions, the court said (p. 39):

> Some of them concern sales subject to a restriction upon the price upon resale, and others relate to a requirement that the article sold shall be *used only in connection with certain other things* to be bought from the patentee.

So, too, in concluding the opinion emphasis is laid on the fact that the alleged infringement was with reference to ink to be "*used*" in connection with the mimeograph; and without which, of course, the mimeograph was a mere inert mass of metal.

The precise point actually decided in *Henry* v. *Dick Co.* was that the patentee could, as a condition to the use of his invention, provide that it should be used only in connection with certain supplies; which supplies *in point of actual fact* bore so direct a rela-

tion to the invention *that it could not be operated without them.* In short, the restriction related to things that had to be used in physical connection with the machine.

Henry v. *Dick Co.* is therefore not a decision in favor of the "tying" clause, because the "tying" clause restriction does not relate to something essential to be used in direct physical connection with the patented machine. The Consolidated's Lasting machine was used for years in making shoes (and could be used for years to come) without the least connection between it and the Metallic Fastening machine. The Lasting machine bears no relation to whether the metallic fastenings in shoes are inserted by the McKay machine or by hand, or by any one of the numerous Independent metallic-fastening machines. The Lasting machine could be operated in every respect and perform its full functions without any direct, necessary, or physical relation to or connection with the insertion of fastenings or attaching of heels.

Therefore we insist that *Henry* v. *Dick Co.* does not foreclose the question in favor of the validity of the "tying" clauses.

2. Is the doctrine of *Henry* v. *Dick Co.* to be extended to an assumed logical conclusion that the patentee may, as a license restriction upon the use of his machine, impose any kind of conditions he pleases, regardless of their direct relation to the operation of the patented article?

It should not be.

However sound the reasoning in *Henry* v. *Dick Co.* (even when applied to "fanciful suggestions of conditions," 224 U. S. 34), that a patentee may sell a coffee pot or a circular saw on condition that it be used only to boil coffee or saw logs obtained from the patentee, there is still a wide distinction between such conditions relating to the use of the patented article with those things which are essential to its operation,[1] and conditions bearing no such relation. The doctrine should not be extended to include the latter.

For example, the owner of a patented mimeograph certainly should not be allowed to sell it with a restriction that its use should be limited to those who used certain patented window frames on the building in which the mimeograph was kept; but such a restriction should be held "as constituting a collateral agreement such as any vendor of personal property might impose, and enforceable, if valid at all, only as a collateral contract" (224 U. S. 18); and hence disposable under the Sherman law without reference to any supposed protection from the patent laws.

The law is practical, not logical.

We freely concede that, as a matter of *pure logic*, it may be reasonably urged that a patentee having

[1] Even the extreme illustrations given in the dissenting opinion of White, C. J. (224 U. S. 55), all relate (with one exception) to conditions as to the use of the patented article in direct physical connection with supplies essential to its operation. The one exception being the patented "window frame" illustration, which approaches quite nearly to the point we are now considering.

the right to exclude others from the use of his patent at all may prescribe such conditions to the use as he sees fit, even though such conditions be foolish or bad.[1]

So here, *Henry* v. *Dick Co.* should not be extended further than to sustain restrictions upon the actual use of supplies in connection with the necessary operation of the patented machine.

In *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. —, this point was involved, but the court decided the case on other grounds without entering into a consideration of the distinction, pressed in argument "between a patented article and a patented tool used in the manufacture of an unpatented article"—the condition there being annexed to the unpatented article produced by the patented tool. Even in that case there was at least some direct connection between the patented tool and the thing produced by its use, while here the restriction attempted by the "tying" clause goes away beyond that. It requires that one using the patented machine shall do so only subject to the restriction (1) that he shall not use another (independent) entirely distinct machine in another and wholly disconnected manner, having no

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[1] Such was the line of reasoning in *Doyle* v. *Insurance Co.* (94 U. S. 535) and *Security Mutual* v. *Prewitt* (202 U. S. 246, 252), which, however, was later abandoned in *Western Union, Tel. Co.* v. *Kansas* (216 U. S. 1), *Pullman Co.* v. *Kansas* (Id. 56), and *Herndon* v. *Chicago, Rock Island & Pac. Ry.* (218 U. S. 135), when the court must have appreciated that the purely logical consequences of its prior principles resulted in conclusions the practical effects of which it could not approve.

direct or necessary relation to the use of the patented machine, and (2) that he will use (not supplies in connection therewith as in *Henry* v. *Dick Co.*) but certain machines wholly unrelated to the operation of the patented machine.

We leave the argument here; this court can quickly determine whether *Henry* v. *Dick Co.* is to be carried to its extreme logical conclusion.

3. But even if *Henry* v. *Dick Co.* is pushed to its full logical result and in a specific case the patent laws, be held to authorize such a restriction as a "tying" clause, yet in this case where the "tying" clauses are but a part of one general scheme of combination, a conclusive and independent reason that the "tying" clauses are not protected by the patent laws is found in *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. —, where it was said with reference to the agreements that the product of the patented machine should only be sold under certain restrictions as to price, etc.:

> The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman Law.
>
> The agreements in the case at bar combined the manufacturers and jobbers of enameled ware very much to the same purpose and results as the association of manufacturers and dealers in tiles combined them in *Montague & Co.* v. *Lowry*, 193 U. S. 38, which combination was condemned by this Court as offending the Sherman law. The added element of the

> patent in the case at bar cannot confer immunity from a like condemnation, for the reasons we have stated. And this we say without entering into the consideration of the distinction of rights for which the Government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

The "tying" clauses were wholly unnecessary to protect the respective patents or the legal monopoly conferred by law upon them. The rights given by patents do not give universal license against the positive prohibitions of the Sherman law, which was a limitation on all rights that might otherwise be pushed to evil consequences.

The various groups of defendants could (under *Henry* v. *Dick Co.*) lease or sell their machines subject to the restriction that they should only be used in connection with such materials, supplies, or other machinery as was essential to be used in order to enable the particular machine to perform its full function; and if *Henry* v. *Dick Co.* be extended to its logical conclusion they might be authorized in any given case to impose an even broader power of restriction; but there the right stopped. When they undertook by combination to unify the ownership of the patents and provide that one machine could not be used save in connection with another machine

(likewise owned by the combination), which latter was in no wise essential to the operation of the first machine, they passed beyond the protection of the patent laws and accomplished a restraint of trade condemned by the Sherman law.

It is important to distinguish between the possible validity of even a "tying" clause used to protect one patent, and the general use of a "tying" clause with utterly dissimilar machines for the sole purpose of combining into one control practically the whole of a great industry. As said in *U. S.* v. *The Reading Co.*, 226 U. S. —:

> It is obvious that the averments do not touch upon the legality of the contracts considered severally, and ask no relief upon the theory that each was a contract in restraint of trade. The theory and charge of the bill is that by concerted action between the defendants the independent operators were to be induced to enter singly into uniform agreements for the sale of the entire output of their several mines and any other they might thereafter acquire, excluding a negligible amount of unmarketable coal and coal for local consumption. And the further theory of the pleading is that by such concerted action and through the higher price offered, the defendants would obtain such control of independent coal as to prevent competition in the markets of other States.
>
> It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be

steps in a criminal plot. *Aiken* v. *Wisconsin*, 195 U. S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful.

That the plan was calculated to accomplish the design averred, in the present case, seems plain enough. The anthracite field was very limited. The means for transportation from the mines to seaboard shipping points were in the hands of the defendant carriers. They, together with their subsidiary companies, controlled about 90 per cent of the coal deposit and about 75 per cent of the annual output. If the remaining output, that of the independent operators along their several lines, could be controlled as to production and sale at tidewater points, there would inevitably result such a dominating control of a necessity of life as to bring the scheme or combination within the condemnation of the statute.

4. Looking at the whole subject broadly, in the light of the principles laid down in the *Standard Oil* and *American Tobacco cases*, and enforced in *U. S.* v. *St. Louis Terminal*, *Standard Sanitary Mfg. Co.* v. *U. S.*, and *U. S.* v. *Union Pacific R. R. Co.*, is it not plain that when persons controlling 80 per cent of the interstate trade in each of four separate non-competing

businesses (but which are complementary each to the other as indispensable parts in one industry) combine into one homogeneous group, and use the power so concentrated to say to the world "We control four-fifths of this business. You must deal with us in every respect and abandon our competitors, for if you do not we will not let you deal with us to any extent," that combination is doing the very thing the Sherman law intended to prevent? (*Montague* v. *Lowry*, 193 U. S. 38; *Loewe* v. *Lawlor*, 208 U. S. 283.)

The patent laws can not be invoked to produce such a stifling of competition by the power of combination.

In *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 337, this court quoted Judge Shiras as follows:

> Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world.

In *United States* v. *Joint Traffic Association*, 171 U. S. 505, 571, it is said:

> It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout

> the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit.

Those principles still prevail.

CONCLUSION.

The judgment below should be reversed.

WM. MARSHALL BULLITT,
Solicitor General.

DECEMBER 13, 1912.

INDEX.

	Page.
STATEMENT OF THE CASE	2
1. The separate groups of defendants and their control of the shoe-machinery business	3
2. The combination into the United Shoe Machinery Company	6
3. Adoption of the "tying" clauses, and their effect	12
ARGUMENT:	
1. The combination was in restraint of trade	21
2. Discussion as to indictment No. 114 and the lower court's opinion upon it in relation to indictment No. 113	24
3. The effect of the "tying" clauses	31
4. Henry *v.* Dick Co., 224 U. S. 1	33
5. Has the Criminal Appeals Act been repealed?	36
6. Response to arguments of Mr. Choate and Mr. Fish	38
7. The lower court's opinion	41
8. Construction of the Sherman Law	43
9. The Department Store theory	45

In the Supreme Court of the United States.

October Term, 1912. No. 620.

United States, *Plaintiff in Error,*
v. [Argued orally January 10, 1913.]
Sidney W. Winslow,
Edward P. Hurd,
George W. Brown,
William Barbour,
Elmer P. Howe, *Defendants in Error.*

ORAL ARGUMENT OF THE SOLICITOR GENERAL.

January 10, 1913.

The court met at 12 o'clock m. Present: Chief Justice White, Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Day, Mr. Justice Lurton, Mr. Justice Hughes, Mr. Justice Van Devanter, Mr. Justice Lamar, and Mr. Justice Pitney.

Present on behalf of the United States: William Marshall Bullitt, Solicitor General of the United States.

Present on behalf of the defendants in error: Frederick P. Fish, of Fish, Richardson, Herrick & Neave, and Charles F. Choate, jr., of Choate, Hall & Stewart.

Solicitor General Bullitt. If the court please, this is an appeal under the criminal appeals act, and I move that there be given two hours on each side for the argument. I

will not use that much time if it can be avoided, but I think the case sufficiently important that the counsel on the other side and the Government ought to have it.

CHIEF JUSTICE WHITE. That will be granted.

ARGUMENT OF THE SOLICITOR GENERAL ON BEHALF OF THE UNITED STATES.

Solicitor General Bullitt. This is, if the court please, the last of the cases now pending involving the antitrust act, and one of the great industrial combinations. Briefly, the question that is presented by this indictment is the validity of what is known as the shoe machinery trust; that is to say, the corporation known as the United Shoe Machinery Company, and the method of business that it has adopted.

This is an indictment of certain individuals, who are charged with having, as individuals, violated the Sherman Anti-Trust Act, by doing things through the device and instrumentality of certain corporations whose actions they directly controlled and directed. The lower court held that the scheme attacked was a legitimate, economic development. The Government contends that instead of being a legitimate, economic development, it is one of the schemes or devices not in the pursuit of normal and legitimate trade, but which was peculiarly devised to accomplish by unified tactics the imposition of terms upon people, which terms could not have been imposed by the same constituents of the combination acting separately.

The indictment alleges these facts, which constitute a

STATEMENT OF THE CASE.

Shoes are indispensable articles of commerce; for twenty-five years past practically all the shoes worn by the people in the United States have been manufactured by machinery, the amount of shoes manufactured by hand being negligible.

In the manufacture of shoes by machinery, four groups of machines are used. Those four may be briefly designated as (1) lasting machines, (2) welt-sewing and outsole-stitching machines, (3) heeling machines, and (4) metallic fastening machines. In each one of those groups there is a very wide variety of machines, different sorts, and covered by different patents.

Prior to the year 1899, there were three groups of persons interested in the manufacture of shoe machinery; they are the men who are now indicted here, but there is no use bothering you with their names. Practically all of the 1,300 shoe manufacturers (that is, people who make the *shoes*, and which for mere convenience of designation, I will hereafter call the "shoemakers"), scattered through thirty-four States, obtained the shoe machinery for their factories from these three groups of persons who had almost a monopoly of the shoe-*machinery* business.

I call your attention to the fact that this indictment charges that it is these various individuals that, *as individuals*, did all the things complained of, but did them through the instrumentality of the corporations that they controlled and directed; very much like the various "get-rich-quick" schemes, with which you are very familiar, where men have done things through the form of corporate organization, but the court has gone through all those forms and said whatever the corporations did, or which the officers who directed the whole thing did, was done by the officers as individuals. That is the way the thing is presented here.

The separate groups of defendants and their control of the shoe-machinery business.

Two or three of the defendants controlled what was known as the Consolidated and McKay Lasting Machine Company, which I will hereafter call the Consolidated Company.

Through this Consolidated Company these defendants manufactured one set of machines—that is to say, they manufactured 60 per cent of all the lasting machines in the country.

Then there was another group of individuals which, so the indictment says, through the instrumentality of another corporation, known as the McKay Shoe Machinery Company, and which I will call the McKay Company, manufactured heeling machines and metallic fastening machines—50 per cent of the heeling and 80 per cent of all of the metallic fastening machines in this country.

Then there was a third crowd of inventors who controlled what is known as the Goodyear Shoe Machinery Company. They manufactured 80 per cent of all the welt-sewing and outsole-stitching machines in the country and also 10 per cent of the lasting machines in the country.

If you want to get graphically an idea of it, you can look at page 16 of my brief, where the competition has been summarized in such a way that you can catch it with your eye and that will help you all. Then, you will observe that the Independents—that is to say, all the scattered manufacturers of shoe machines throughout the United States—controlled 30 per cent of the lasting machines, 30 per cent of the heeling machines, 20 per cent of the metallic fastening machines, and 20 per cent of the welt-sewing and outsole-stitching machines.

So that, speaking generally, these defendants controlled about 70 or 80 per cent of the manufacture of each of these classes of machines, and there was some 20 to 30 per cent of the trade of each of these machines in the hands of the independents. That was the condition of affairs, except that there was some slight competition between the Goodyear Company and the Consolidated Company with reference to

asting machines; it was not a very great competition, but still was about 10 per cent of the business.

These different groups of defendants manufacturing these various kinds of machines were noncompetitive. The court will bear in mind the fact that this arises from this fact, different from any——

Mr. Justice McKenna. Were they noncompetitive or in competition?

Solicitor General Bullitt. Yes, noncompetitive; that is the fact I want to bring to the court's attention. These different groups were noncompetitive, and that is wherein this case presents in some respects a phase different from any of the antitrust cases that have heretofore been considered by this court. In view of that suggestion of Mr. Justice McKenna, I will state briefly what the contention of the Government is in that respect. Here is an article of commerce, shoes; every shoe is made by four different kinds of machinery; that is to say, in the manufacture of a shoe there are four distinct, essential, absolutely indispensable processes of shoemaking, each performed by a different machine. I am not sufficiently expert to explain accurately what is done by the lasting machines, except that it is to sew the uppers to the soles. Another part of the process is attaching the heels; another is putting in the metallic fasteners; and then the welt sewing, and the outsole stitching for certain stitching operations.

Mr. Justice McKenna. What do you call a "metallic fastener"?

Solicitor General Bullitt. They put on the eyelets—I am not sure whether that also includes driving nails, but metallic fastening is certainly putting on the eyelets and things of that kind. You will see, therefore, that these different machines are absolutely noncompetitive, and

each corporation made up a different group, because each corporation made only a single class of machines with the exception of one of them (Goodyear group), which made 80 per cent of one business, and 10 per cent of one of the other groups——

CHIEF JUSTICE WHITE. They did not do the same business?

SOLICITOR GENERAL BULLITT. They did not do the same business; but each business was an essential and indispensable part of the manufacture of the completed article or shoe.

The combination into the United Shoe Machinery Co.

The scheme that was adopted was for the men to get together and combine under what you might call the department-store idea; and combining the business into one, so that all the machinery made use of in the manufacture of shoes would be furnished by the same group under one control. You will later in the course of the argument be shown exactly why that is in violation of the Sherman law; but it is different from any case that has been here heretofore, in that this is a combination of non-competitive businesses, by which, however, they constituted a combination and acquired so great a control over the entire business as to make it in violation of the Sherman law.

Let us see what they did.

These individual defendants, who thus separately controlled each one of these separate corporations, undertook to combine their businesses by the organization of the United Shoe Machinery Company. What they did was not simply to form a huge company at all, like, for instance, the Steel Trust. The indictment proceeds on a different theory. These individuals simply adopted a device; and that device was the organization of the United Shoe Machinery Company,

to which these individuals simply turned over the capital stocks and business of these separate companies—that is, simply turned over the business which each one of these groups of individuals had been conducting separately through these corporations—to the United Shoe Machinery Company. They did not turn over the title, they did not convey the title to their real estate, for instance; they did not convey that to the United Shoe Machinery Company, for they absolutely retained the titles to the property in the respective corporations under which they had previously been conducting business, but what they did was to turn over the capital stocks and the good will and the business of these several companies and the businesses which each of these several groups then had been doing; turned it all over to the United Shoe Machinery Company. Then these three groups of individuals, consisting of five or six men, so the indictment alleges, continued as a homogeneous, unified group of men, to conduct through the instrumentality of the United Shoe Machinery Company all the businesses which had previously been conducted by these same groups acting separately. Now, that is what they did.

Mr. Justice Pitney. The indictment shows the United Shoe Machinery Company was a holding company. You spoke of their having turned over to the company the capital stock and also the good will. The good will would be the property.

Solicitor General Bullitt. I do not understand by any means that "good will" means real estate.

Mr. Justice Van Devanter. What was turned over?

Solicitor General Bullitt. Turn to the top of page 21 of the record; "good will," that is included under the word "business," as I construe it. Observe that this indictment is against individuals, and the theory of it is that these different groups of individuals who had been previously

conducting these separate businesses *as individuals* then all got together, and pooled themselves first, and then continued to transact a complete business, still doing it *as individuals*, through the guise of the United Shoe Machinery Company.

CHIEF JUSTICE WHITE. That is a separate noncompetitive business?

SOLICITOR GENERAL BULLITT. Yes. You observe the language,

> said groups of defendants thereupon severally turned over to the United Shoe Machinery Company and caused that corporation to accept, take over, and hold the capital stocks and business of the three corporations in the names of which they had before carried on said business, trade, and commerce as aforesaid, and said defendants ever since have together continued to manage, control, and conduct, in the name and through the instrumentality of the said United Shoe Machinery Company * * *.

You will observe it says—

> and in the names of divers other corporations, and concerns subsidiary to the said United Shoe Machinery Company, some of which have been from time to time organized, and others purchased for that purpose by said defendants, all the business so as aforesaid before independently carried on by said three groups of defendants, including the interstate business, trade, and commerce aforesaid.

You will observe that the indictment is most careful to avoid the allegation that they turned over the title to the real estate, or anything like that, because what was done in the organization of this company and the way it was done was that just a lot of individuals composing several groups (each group of whom absolutely dominated and controlled these separate businesses, and which they conducted through

the device of a corporation, just a mere corporate form) got together and simply agreed to form a combine of these businesses.

What I am going to show to the court, if I can, a little bit further along, is that by combining these noncompetitive businesses, they put into the hands of one crowd of people 80 per cent, approximately, of all the shoe-machinery business of the United States.

Right here I will say that the Government concedes that it would be an entirely legitimate and economic development to run the manufacture of shoe machinery on the department-store idea.

That if, for instance, it was necessary in the manufacture of shoes or any other thing to have four or five different kinds or elements each of which was entirely separate, why instead of letting "A" make one of those machines and "B" make another one, and "C" make another one, there is absolutely no objection to a combination by which one concern or one corporation will combine two or three of those same noncompetitive businesses, so that one concern can furnish all the necessary machinery that is used in making some particular article. But that is subject to the limitation that you can not thereby put into the hands of this concern the whole business nor such a proportion of it as will constitute it as an undue restraint of trade. As to what that percentage is we can not undertake to draw any definite line. In the *Swift* case it was sixty per cent, you will remember, of the amount of the percentage of control of competition; in the *Bathtub* case, of course, it went off on other——

Chief Justice White. In that case there was eighty-five per cent.

Solicitor General Bullitt. Those were competitive business combined. These are noncompetitive businesses. This will have to be developed, because to some extent it is a new proposition. It is not the mere combination of the noncompetitive businesses, which in itself is a violation of the Sherman Act, because I concede that the mere combination of noncompetitive businesses is not in itself a violation of the Sherman law, but if by the combination of noncompetitive businesses (each of those noncompetitive businesses having such a large proportion of that particular business) the resulting corporation then has an undue proportion of the whole, like the American Tobacco Company, so that as the result of the combination it has eighty per cent or eighty-five per cent or ninty-nine per cent it is a violation.

Chief Justice White. The tobacco case, Mr. Solicitor General, was a case where the people went to work to bring on trade control, worked to destroy opponents, and do lots of things which are in violation of the Sherman Act, which was built up by one nefarious act after another one, conceived in iniquity and brought forth in sin; that was all the court found about the case.

The Solicitor General. Of course——

Chief Justice White. How do you liken this to that under your statement?

Solicitor General Bullitt. It is only in this. The result is that a combination gets so large a proportion of the total business, that that in itself constitutes a violation of the act.

There will be something more for me to show you as to the things they did. I have not gotten to that. Consider the leases that were adopted, the tying clauses in the lease, and I will come to that shortly. That is one of the elements.

It might be contended that each one of these separate groups was originally, and prior to 1899, in itself a combi-

nation in restraint of trade, because they had acquired so large a proportion of the interstate business in that particular machinery, but that is not presented here. That would be an interesting question, but certainly when this combination was carried through it then had control of about eighty per cent of the total interstate trade.

If it be legal to gather together into one corporation eighty per cent of all the interstate trade in some particular line of activity, where it is done gradually, by perfectly legitimate methods, without any unfair competition, such as characterized the *American Tobacco* case, or the *Standard Oil* case—if, I say, it be the law that it is perfectly proper for the various businesses to get together and get control by perfectly legitimate means, just to gather together eighty per cent in any particular line of business, then the sooner the business world understands it the better.

The Government contends, however, that there is somewhere a line where the combination which brings into one hand interstate business of some particular character and some percentage of the total, passes the legitimate line of business development, and becomes really a combination in restraint of trade, by giving them the power to enhance prices and suppress competition; not by virtue of monetary size, for it is not the size of the corporation (according to the number of thousands of dollars or millions of dollars that it may represent), that is in itself illegal, but it is the *undue proportion of the total business* that in itself becomes a combination in restraint of trade.

Mr. Justice Pitney. Does the indictment refer to the prevention of competition in the manufacture of shoe machinery or in the manufacture of shoes, or the sale of shoes?

Solicitor General Bullitt. I should say there are two counts. The first count charges a combination in restraint

of the trade of the defendants themselves; count 2 charges a conspiracy in restraint of the trade of the shoe manufacturers of the country, and all the necessary formal averments about the suppression of competition and all that sort of thing appear in the indictments. This indictment, it seems to me, is quite different from the cotton "corner" indictment. I can see no defect in the formal parts or any failure to make any necessary averment in this indictment. This indictment, so far as the Government can see, comes up in every way to the very best requirements that could be made of it, and you come down really to the merits of this combination.

Mr. Justice Pitney. Does your indictment give the names of the shoemaking concerns? Does the indictment charge that the entire combination of individuals then brought about among themselves was to stifle interstate competition in the manufacture of these shoe factors?

Solicitor General Bullitt. Let me quote you the exact language. It charges that the combination effected a restraint of trade in shoe machinery between the separate defendants; and that it also was in restraint of trade between the manufacturers of shoe machinery and the shoe manufacturers whose names appear as located in the various States. Does that answer Justice Pitney's question?

Mr. Justice Pitney. Yes.

The adoption of the "tying" clause.

Solicitor General Bullitt. What did they do? The next thing they did, after the 7th day of February, when they organized this United Shoe Machinery Company and turned over to it all the businesses that they were theretofore conducting separately, was this: They then adopted a form of lease. The indictment says that *prior* to 1899 each of these groups of defendants had sold or leased the machinery

which they respectively made to the shoe manufacturers throughout the country. After they had formed this combination they adopted a uniform lease. There seems to be some difference between the construction which the Government puts upon the allegation of the indictment as to the terms of the lease and the construction which the defendants' counsel put upon it.

Mr. Justice Pitney. What did the court below say?

Solicitor General Bullitt. The court did not say anything about it. The Government thinks that the allegation concerning the terms of these leases that are commonly known in this country as "tying clause leases"—a very well-known expression—amounts to just this: Here are several different machines that are used in different parts of the process of making shoes. These defendants then provided in their leases as follows: "If you use one of our lasting machines"—they will say this to a shoe manufacturer—"you must agree that you will use in the manufacture of shoes all the rest of the kinds of machinery that we make, and that you will not use anybody else's machinery." In other words, they say: "If you want to use our lasting machines, you must also use the other machines that we make—one or more of the other machines"—and, of course, they had to use *all*, because you can not make shoes without using *all* four of these different kinds of processes.

Mr. Justice McKenna. If that be true, how was there any onerous condition imposed?

Solicitor General Bullitt. Wait a minute. They would say: "Not only must you use all of the other machines that we make, but if ever you use anybody else's machinery, then we will cancel our leases, and you can not have any of our machinery." You asked, "How was that an onerous condition?"

Mr. Justice McKenna. Yes.

Solicitor General Bullitt. Well, let me point out to you the way in which that operated. There are three cases that I think of (the cases of *Montague* v. *Lowry*, the *Bathtub* case, and one other case) that really, I think, control it and settle it, but here is briefly what is known as the "tying clause lease." They said to every shoe manufacturer, "You use one of our machines." "Now, then, you have got to use all of the rest we make"—that is the condition—"and if you use anybody else's machinery, we will take away these machines that you have got." You ask how does that impose an onerous condition, and how does that suppress competition, or how does it restrain trade? Let us see. Take, prior to 1899, the case of a shoe manufacturer in any foreign State. Mind you, he is going to make shoes. He has got to have four kinds of machines to make them—the lasting machine and the heeling machine, the metallic fastening machine, and the machine known as the welt-sewing and outsole-stitching machine.

If the court will turn to page 18 of the Government's brief, there is a table there and I would like for you to see it, for it really illustrates this better than all the talking I could possibly do. Mark you, prior to 1899, if a manufacturer of shoes wanted to make shoes and wanted to go out and get his different machines, how could he get his machinery? There were twenty-four ways that were open to him prior to 1899 by which he could equip his factory with shoe machinery. You will observe by the tabulated statement that there would not be any doubt about it. He could get, for instance, a lasting machine from the Consolidated Company; he could get a heeling machine from the McKay Company, and the metallic fastening machine from the McKay Company, and the welt-sewing machine from the Goodyear Company, and so on, all the twenty-four different ways. I have treated

all of the Independents as one group. If I should take the Independents as so many different factors as there were Independent manufacturers, the combinations would be infinitely greater in amount and the consequent reduction of competition which I will call to your attention would be even more startling.

Mr. JUSTICE PITNEY. Does the indictment show that these different companies could be thus combined? Does it show that they could take the part made by one machine and put it together with the sole made by another, not combined in a single machine and putting it to the sole?

SOLICITOR GENERAL BULLITT. I am not sure that I quite catch your question?

Mr. JUSTICE PITNEY. I have inquired, since I do not know, whether there are two different methods of attaching the upper to the sole making this part of the manufacture.

SOLICITOR GENERAL BULLITT. The indictment does not indicate there are two different modes. The indictment says on page 1 of the record practically all of the shoes manufactured and worn by the people of the United States—of course, there are a few made by hand—for twenty-five years have been manufactured by different kinds of machines, which are called shoe machinery in this indictment; in other words, the term "shoe machinery," according to express definition, refers to and only to the kinds of machinery described in the indictment. It says: "A general description of which said shoe machinery"; that is to say, a description of the different kinds of shoe machinery which are and have been used, are lasting machines, welt-sewing machines and outsole-stitching machines, heeling machines, and metallic fastening machines, and it then tells what each of them did. There are four kinds, each of which is noncompetitive and is an indispensable machine to do a different function in the manufacture of shoes.

CHIEF JUSTICE WHITE. I do not think you have answered Justice Pitney's question.

SOLICITOR GENERAL BULLITT. I did not catch his question.

CHIEF JUSTICE WHITE. Does the indictment show that they could practically use the Goodyear welting machine with the McKay fastening machine and the McKay heeling machine?

SOLICITOR GENERAL BULLITT. Why, certainly.

CHIEF JUSTICE WHITE. All right.

SOLICITOR GENERAL BULLITT. Yes; it does.

CHIEF JUSTICE WHITE. I can see theoretically there are twenty-four combinations. I wanted to know if the indictment shows those twenty-four?

SOLICITOR GENERAL BULLITT. Yes. It does not put it in that precise form, but it says that in the manufacture of shoes—all shoes made by the different kinds of machinery—there are four different groups of machines that are used in making shoes.

CHIEF JUSTICE WHITE. What does the lasting include? Is that the mode of making that upper?

SOLICITOR GENERAL BULLITT. The lasting?

CHIEF JUSTICE WHITE. Each of these processes; is that the result in the fastening of the upper to the shoe? I presume that comes ahead of the heeling or soling. What are the processes in the manufacture of a shoe?

SOLICITOR GENERAL BULLITT. I do not know; the indictment does not show.

MR. FISH. May I answer that question?

SOLICITOR GENERAL BULLITT. It is not in the indictment.

CHIEF JUSTICE WHITE. Never mind, then.

SOLICITOR GENERAL BULLITT. I have not the slightest idea how shoes are made, but it says that lasting machines "are designed and used for the purpose of lasting uppers of shoes." What that is, I do not know, but it says that

practically all the machinery that is used by these 1,300 shoemakers, whose names are set forth, is furnished by the defendants, and that each one of these different groups of machines has to be used in the making of a shoe; and you will observe these different groups of defendants did not make more than one group of machines, except in one single instance. Each one made a different machine.

Mr. JUSTICE HUGHES. Suppose they would get a machine that was made by one of these defendants. Does the indictment say that they could, in the process of manufacture, resort to one or more of these machines made by the Independents?

SOLICITOR GENERAL BULLITT. Prior to the combination, that is the real effect of it. After that they were prevented from doing it by this combination.

CHIEF JUSTICE WHITE. Do I disturb you by asking questions?

SOLICITOR GENERAL BULLITT. Not a bit.

CHIEF JUSTICE WHITE. I just want to get it in my head what your thought is. If I understand your argument, it is this, that there were four great subdivisions in the manufacture of shoes?

SOLICITOR GENERAL BULLITT. Yes.

CHIEF JUSTICE WHITE. That in each of those four great subdivisions there were certain classes of people who held a large proportion of the machinery in each class applicable to the making of shoes; that in each class a certain number, constituting a large majority of those people in each class, got together and pooled their issues, if I may so state it?

SOLICITOR GENERAL BULLITT. Yes.

CHIEF JUSTICE WHITE. And that the result of that is to prevent any person in the country, by virtue of that combination, from buying any one of the parts of machinery, and

that those four classes got into that combination and shut others out from buying. They are the people who are in the combination?

SOLICITOR GENERAL BULLITT. I do not follow clearly that very last sentence.

CHIEF JUSTICE WHITE. You say there were eighty per cent in this combination?

SOLICITOR GENERAL BULLITT. Practically seventy or eighty per cent of each one of the four classes.

CHIEF JUSTICE WHITE. Then there were the difference between eighty and seventy per cent and 100 per cent outside to do that work. The result of these people coming together was to force every man to buy each of the different kinds from those people having the eighty per cent?

SOLICITOR GENERAL BULLITT. If they wanted to they could buy from the people having the twenty per cent; they would have to buy all from the Independents or buy all from the trust.

CHIEF JUSTICE WHITE. I see.

SOLICITOR GENERAL BULLITT. I was going to say that prior to 1899, as shown on that paper to which I called your attention, there were twenty-four different ways that a shoe manufacturer could equip his factory with machinery. Then, you will find on page 21 of the brief the number of possible ways that he could equip his factory immediately *after* the combination was formed. As soon as the combination was made, instead of having *twenty-four* ways, he was reduced to *sixteen* ways. They are set forth in a table on page 21 of the brief.

MR. JUSTICE PITNEY. That is, without the "tying" clause?

SOLICITOR GENERAL BULLITT. Yes, without the "tying" clause. I will come to that in a minute. So that prior to the combination a man could equip his factory in twenty-

four different ways. After the combination he could equip it in sixteen ways. Then, the tying clause was adopted, and then his choice was reduced to two ways. He had the choice, as suggested by the Chief Justice, of getting four of his machines from the trust, or he could get all four of his machines from the Independents, either one he wanted. If he chose to take Independent machines, he must get *all* from the Independents; if he chose to get his lasting machines from the trust, he must get *all* his machines from the trust. He had two ways of getting machinery.

The effect of this scheme was to reduce the choice from 24 to 2, thus answering question put to me earlier in the argument about the onerous condition imposed, where Justice McKenna asked whether there was anything onerous in the leases of this combination. There it is. That may be perfectly legal. This is the new phase which is presented to the court to pass on. A shoe manufacturer had twenty-four ways of equipping his factory; the day the combination was formed it was reduced to sixteen ways, and then by the adoption of the tying clauses that was reduced to two ways.

Mr. Justice McKenna. Would not that require selection varying with the indictment, showing inefficiency, difference in price, and things of that sort?

Solicitor General Bullitt. No; it does not. The indictment says that inasmuch as the best machines were covered by patents, and inasmuch as they were very expensive to manufacture, the makers of shoes could not make their own machinery, but were compelled by those considerations to get their machines from the makers of shoe machinery.

Chief Justice White. Putting my thought again to you, your position is this: If I was a manufacturer of shoes before this combination, and I wanted to buy a machine of class 1 from "A," and also class 2 from "B," and also class 3 from

"C," the effect of this was to cut me off, and deprive me of all selection and bind me to the two selections. The selection was in the hands of these people who combined as an entirety or selection from the outside?

SOLICITOR GENERAL BULLITT. Precisely, exactly.

Mr. JUSTICE McKENNA. Is that the full extent of it? They were not driven to take inferior machinery, they were not driven to take machines inferior in price, but only compelled to select the seller.

SOLICITOR GENERAL BULLITT. That is all. I want to show where that falls within the ruling of the court, the principle that the Sherman Act undertakes to condemn any sort of combination——

Mr. JUSTICE PITNEY. Will you clear up that point? Do I understand that it is to be inferred from the indictment that it would make no difference in the size, style, or the cost of a shoe if it was bought from the manufacturer?

SOLICITOR GENERAL BULLITT. The indictment is silent on that subject. So far as the indictment is concerned, there is no distinction. The trust may be better than the Independents or less good, or the prices more or less.

Mr. JUSTICE DAY. Before this tying up, and people went into this combination?

SOLICITOR GENERAL BULLITT. I do not recall whether those were the express words; I doubt it. I do not think that express phrase is used there, but it just simply says that before the combination each of these groups had eighty per cent of the business of making this particular kind of machine; another group had eighty or seventy per cent of another kind. Of course that just necessarily means that somebody else had the other twenty per cent. When you say one party has eighty per cent of the business of making a certain kind of machine, that necessarily means that somebody else has the twenty per cent.

Mr. Justice Pitney. Somebody else still has that twenty per cent?

Solicitor General Bullitt. Oh, yes; somebody else has that twenty per cent still. Now, you will observe that as long as these Independent groups stayed Independent a man could get one of his machines from one concern and one of his machines from another, or two or three machines from the people in the trust and one or two others from the Independents.

Mr. Justice Day. How many counts are in the indictment?

Solicitor General Bullitt. Count 1 and 2—only 2 counts in the indictment.

The combination was in restraint of trade.

Solicitor General Bullitt. You will observe, too, that as long as these groups stayed separate it fostered competition on the part of the Independents. While each one of these groups (as long as they remained separate) had seventy or eighty per cent of the business of that particular kind of machinery, and that in itself probably might be almost a monopolistic control or attempt at it, yet the peculiarity of the shoe-machinery business as a whole was such that there was a fair degree of competition in this way. In view of the great universality of the use of shoes and its enormous amount, the Independents could pick up here and there and get a good deal of business, because some shoe manufacturer would get mad and get dissatisfied with the lasting machine made by the Consolidated Company. Well, he would say, "I will go and get an Independent lasting machine, and I will get everything else from the other fellows."

So that among all the manufacturers throughout the country there would be constantly, obviously, shoe manufacturers that would get dissatisfied with this or that machine made by one or the other of these separate groups and he

would go and get that particular machine from the Independent, if he pleased, so that as long as these different units or groups which were not competitive were absolutely separate and independent, and not acting in unison together, there was necessarily a good deal of competition. The Independents could pick up business here and there, and there was some slight competition, as an illustration, as to lasting machines between the Goodyear Company and the Consolidated Company. Now, then, the Consolidated Company made lasting machines, and so did the Goodyear Company. You can see there was some little competition between them, which was subsequently eliminated.

Let us see what was the effect, now, of the combination of these three independent units into one group. In the first place it eliminated, as I say, this small competition of lasting machines, ten per cent of it, between the Goodyear Company and the Consolidated Company, but that is not to be neglected, for in one of the cases that was recently decided—I think I have probably got it here—it is *U. S.* v. *Union Pacific*, 226 U. S., you said:

> It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law,

and the court went on to say that while the competitive business was in volume but a small part of the sum total, nevertheless it was pretty large and by no means negligible, but a large and valuable part, of interstate commerce, which was directly affected, and so it is here.

Next, the effect of this combination was to abolish these three separate groups and put in simply one group; it created one group, then, that had a dominating control of the whole field of the manufacture of shoe machinery. And, observe,

that no longer when a customer, a shoe manufacturer, became dissatisfied with one of these machines, was he free, then, to conduct his business as to the balance of the machines unaffected by his disagreement, but the minute he fell out with the combination, with the man who made the lasting machine, there was *ipso facto* a falling out with the men who made all of the other machines he had to use in his business. The power of this combination was such that by virtue of the combination, just purely by virtue of the combination alone, the combination was able to and had the power, whether it exerted it or not. As held in the *St. Louis Terminal* case, it is the existence of the power of the combination, not necessarily the exercise of it, which the court holds to be illegal.

If I read the *St. Louis Terminal* case aright, the power that the railroads had in St. Louis by virtue of the conditions there to impose terms on roads that wanted to cross the river, created the restraint of trade, regardless of whether the roads in point of fact, did exercise the power to exclude roads. And so here; this gave to the combination *the power* to impose terms on customers which they did not have acting separately. Each one of these groups, acting separately, could have imposed such terms, as it pleased concerning a particular machine that it made, but as long as they were separate it could not be effectively said to a shoe manufacturer, "You may use a lasting machine but only on condition that you will use and only use certain other specified machines," but as soon as they were combined then they had the power to impose a condition upon a customer that they did not have theretofore; that is to say, the power was the result of the combination. Now, is that or not a restraint of trade?

But further, there was a restraint, and let us see what is restraint. In the first place, the liberty of action by these defendants themselves was restrained.

Discussion as to Indictment No. 114 and the court's opinion upon it, in relation to Indictment No. 113.

Mr. Justice Hughes. Mr. Bullitt, before you get into the argument on the law, there is one matter I should like you to look at there, and that is this: Was the charge in the indictment based on these tying leases, so far as that is concerned, and was not the demurrer overruled?

Solicitor General Bullitt. Oh, no; it was not at all; no indeed.

Mr. Justice Hughes. Did not the court sustain that count?

Solicitor General Bullitt. No, indeed; it did not. I wish it had. That is correct, is it not, Mr. Fish?

Mr. Fish. According to the facts——

Solicitor General Bullitt. Yes; what happened was this. I was really reserving this, perhaps, until the other counsel had spoken. To answer your question, Mr. Justice Hughes, I will just tell you the facts. Two indictments were found against these defendants, one known in the record as indictment No. 113, and one known in the indictment as No. 114. No. 113 is the only indictment appearing in this record. No. 113 consisted of three counts—counts Nos. 1, 2, and 3. The court held that count No. 3 was bad, and the Government acquiesced in that, and does not even appeal from it.

Mr. Justice Pitney. Upon what, pleading?

Solicitor General Bullitt. The ground the lower court put it on was bad pleading; that by reference it incorporated the allegations of both counts 1 and 2 into count 3, which thereby became bad for duplicity—and the Government abandoned count 3, and it does not even appear in the record.

Mr. Fish. Yes; it does (Record, p. 45).

SOLICITOR GENERAL BULLITT. At least, I have never paid any attention to it. The lower court knocked out count 3 and the Government does not assign it as error at all. Now, counts 1 and 2 allege the same facts, with simply formal variations, in order to charge (1) a combination and (2) a conspiracy, one in their own trade and the other in the shoe manufacturers' trade. Demurrers were sustained. Indictment 114, which does *not* appear in this record, embraces two or three counts, I have forgotten which, and in that indictment the lower court, Putnam, overruled the demurrer as to one of the counts, and sustained it as to the others.

Mr. JUSTICE DAY. Is that here?

SOLICITOR GENERAL BULLITT. No; I am just coming to that here. I do not think you can, when you come to read the opinion, fail to be confronted with this difficulty; the opinion undertakes to deal with indictment 114, that is *not* in the record. Practically the entire argument in the opinion deals with indictment 114, and it is *not* in the record. There is enough in it by quotations for you to see that it is quite dissimilar from the one that is in the record; and the court in its opinion disposes of the indictment 113 that you are considering very summarily; devotes only a sentence or two to it, and in one place it says: "The first and second counts"—which are here—"are invalid for the same reason which invalidates the second count of indictment 114," which is not even before you, and there is where you are going to have considerable difficulty in finding out what the lower court was driving at.

Mr. JUSTICE HUGHES. What led me to ask the question was this, glancing at the opinion of the court, and having in mind the fact that we are dealing with the court's construction of the statute, and not dealing with the indictment, as distinguished from the construction of the statute, I got the

impression that the court had construed the statute as to color, for the purposes of the demurrer, the alleged illegality of a combination shown by the tying clauses in the leases, and had, on the other hand, decided against the Government in construing the statute so as to exclude all combination of these various companies in the merger of which you have spoken.

SOLICITOR GENERAL BULLITT. I think, if the court please, that you misapprehend the opinion or what the court did about it, which was this: The court said, "We do not think it is even necessary to consider the 'tying' clauses, considering the patents." The court did not consider the "tying" clauses practically at all. It said there was some defense about the patent laws, but it was not necessary to decide that. His decision just "cut" clear under that. The language of the lower court is, "hoping that the Supreme Court may have to dispose of it in some way before we are forced to proceed with it, if ever;" and further imposes criticism upon the Department of Justice for having proceeded by criminal indictment instead of by civil proceedings.

Mr. JUSTICE HUGHES. Did not the court construe the statute as not covering the case to which you claim with respect to tying clauses in the leases?

SOLICITOR GENERAL BULLITT. The court does not refer to the tying clauses, as I recall it. I do not think the court referred to the tying clauses side, top, nor bottom. He just makes a mere reference that one of these indictments now before you was evidently drafted with the idea of presenting to the court the question of whether the patent laws in any way would affect this question, and the court says he does not think it necessary to consider that.

Mr. JUSTICE PITNEY. Where is this opinion reported?

SOLICITOR GENERAL BULLITT. In 195 Federal Reporter, 578.

If the court please, you are having the same trouble I had with it. I can not give you much help on the opinion now, because there it is. I do not know whether it is reported or not. He writes his opinion in 114 and deals with it all around, and then he just comes to 113 or the part of 113 we are concerned with and disposes of it for the same reason, that one count in indictment 114 is invalid.

Mr. Justice Pitney. You understand his opinion in 114 is the opinion applied to 113?

Solicitor General Bullitt. That is his opinion. Of course, we will come a little bit later to the question, which perhaps I imagine is running through the minds of some of the court, involved in the *Patten* case.

In the brief for the defendants they say that the court held these two counts of indictment 113 bad for duplicity, and that being held bad for duplicity this court has nothing whatever to do with the case. My response to that will come up in the concluding argument more fully, but briefly. *First*, the court did not hold them bad for duplicity at all. It held them bad for the same reasons that it held bad one count in 114 and then when you come to see for what reason it held [illegible]4 bad you will find that that was bad *not* on the ground [illegible] duplicity at all, but upon the ground that the combination set forth in 114 was one which never has been condemned by any of the decisions under the Sherman law; and the only ground or basis for counsel saying it was held bad for duplicity is their construction and deductions from a loose expression at the very beginning of the opinion, which, later, after they have elaborated their argument, I will call attention to. On the point of duplicity I want, however, to just get into the minds of the court one idea, so they will have it when they hear the argument on the other side. If an indictment is held bad for duplicity, it can only be

because that count of the indictment charged with duplicity sets forth two offenses, each of which is set forth so completely as to constitute a correct indictment. The court in this case held certainly that this count constituted *no* offense. An indictment can not be bad for duplicity when the court holds that it states *no* offense.

Second, The real truth concerning the argument about duplicity is this: In the *Kissel* case the defendants propounded the idea that the making there of a contract in restraint of trade was the offense, and that what was done .thereafter were merely acts done under it, and that the statute of limitations had run as against the contract. This court held in the *Kissel* case that it was a continuing conspiracy, and that the statute did not run. Therefore, they could not make exactly the same argument they did in the *Kissel* case. So in this case they present the same argument in a new form. They say this indictment is "bad for duplicity" because it alleges both (1) the organization of the United Shoe Machinery Company—what they call the "merger"—and (2) the adoption of the tying clauses. What the Government says is that the indictment alleges a conspiracy and combination in restraint of trade, consisting of the organization of the United Shoe Machinery Company and the adoption of the tying clauses, both of which, although happening at different moments of time, are the means by which the combination was carried out. So much for the theory of duplicity.

The position of the Government is that when these three noncompetitive businesses combined into one, thereby putting into one hand as much as eighty per cent of the total interstate commerce of the country, that itself is illegal and is in restraint of trade. It, however, is made even more manifest by the adoption of the tying clauses, which reduced

the possible choice of competition from 24 choices to 2 choices. What about the effect of these tying clauses?

Mr. JUSTICE DAY: Do you think this judge held these tying clauses were not within the indictment?

SOLICITOR GENERAL BULLITT. No; it is my impression that he does not say anything that is comparable to that. I think, as far as I recall, and if I should be wrong——

Mr. JUSTICE DAY. Unless he so construed the statute, what are we to pass upon?

SOLICITOR GENERAL BULLITT. My understanding from the cases cited in the closing pages of the brief in the cotton-corner case is this: You are bound by whatever the court says the indictment alleges. That is all. If the court says the indictment sets forth certain facts, you are bound by that, or as you put it in the *Patten* case, in passing upon the demurrers, the circuit court proceeded first to construe the counts—that is, to ascertain with what acts the defendants are charged. In other words, you are bound by what the lower court says are the acts the defendants are charged with. You must assume that the counts adequately allege whatever the circuit court says was alleged in the indictment; that is all you are bound by, namely, what the circuit court may say as to what acts the defendant did—that is to say, what the words of the indictment mean; but you are not limited to simply saying whether the reasons given by he court in construing the statute are good or bad, for the perfectly obvious reason that if you were limited to simply saying whether the reasons given by the court in construing the Sherman law were good reasons or bad reasons, and could not consider anything else, why, the right of the Government to appeal under the criminal appeals act would be taken away by the simple expedient of never filing an opinion. Of course, that could not be. Every time the

defendant was charged with violating the Sherman law, if the lower court simply said, "demurrer sustained," why this court then would have nothing to do. If that idea is right, then by not filing any opinion the circuit court could deprive the Government of the right to have its decision reviewed. So, as I understand the rulings under the criminal appeals act, it is this, that where the indictment is founded upon the Federal statute, this court is absolutely bound by what the lower court says the indictment charges the defendant with, so far as the meaning of words is concerned.

You are then to say whether the acts charged in the indictment do or do not constitute a violation of the Sherman law.

Mr. Justice Pitney. Have you applied to the court below for a certified bill of exceptions showing the grounds upon which this ruling was based?

Solicitor General Bullitt. No. There may be such a procedure under Federal practice, but it certainly never was adopted, so far as we are aware.

Mr. Justice Pitney. I think you have not examined this case very closely. I find such a bill of exceptions in this case.

Solicitor General Bullitt. Let us see where that is, which page, if the court please.

Mr. Justice Pitney. 72.

Solicitor General Bullitt. Oh, yes; I am glad to have my attention called to that. That is purely a formal matter, and just simply says it makes the opinion a part of the bill of exceptions, and does not either admit or deny the opinion in this bill of exceptions.

Mr. Justice Pitney. Above that it says: "The United States is aggrieved by that part of said decision which sustained the defendant's demurrer to the first and second counts of said indictment, whereby the said court, in substance, construed the first section of said act of July 2, 1890, as not applicable to the state of facts alleged in said first and

second counts, respectively, and held, in substance, that neither said first nor second counts state a case within the meaning and intent of said first section, to which rulings of the court and to each of which the United States then and there excepted and still except."

SOLICITOR GENERAL BULLITT. Is that anything more than is always implied on sustaining a demurrer? There a demurrer was sustained to the offense charged under the statute. That is a pure formality, and that bill of exceptions says the acts found did not constitute any offense. I do not myself appreciate that this bill of exceptions does anything more than state what is necessarily involved in sustaining a demurrer to an indictment. I paid no attention to it, as it was wholly unnecessary and useless to be there at all.

MR. JUSTICE DAY. It says: "By allowing this bill of exceptions, either admit or deny the construction given such opinion in this bill of exceptions." That is a sort of a curiosity in legal literature, I think.

SOLICITOR GENERAL BULLITT. I likewise think that some parts of the opinion are something of a legal curiosity, where he says he does not understand why the Department of Justice directs, and the President permits, criminal proceedings like this—to indict a man where a bill in equity could have been filed. I am perfectly willing to rest the case when the court commences to read the opinion, on the sufficiency of any technical objections that might be raised to the indictment.

The effect of the "tying" clauses.

So far as the tying clauses are concerned, what was the effect of the tying clauses?

First, They limited the trade, the power, and liberty of action of these defendants, by, in fact, saying to each one of

the defendants, "You can not sell." In other words, the effect was that a lasting machine could no longer be sold or leased by those defendants who had previously controlled it as freely as they could before. Whereas the defendant controlling the lasting machine could previously let it go out with an Independent's heeling and fastening machine, as the result of this combination a restraint was imposed upon the defendants themselves, so that they could no longer let their machines go out and be used with the machines of the Independents, but they could only be used in conjunction with their own machines.

Secondly, They restrained the liberty of action of the shoe manufacturers, because they were no longer able to buy and use or lease and use Independent machines in conjunction with these trust machines or these Consolidated, McKay, and Goodyear machines, as they had previously done; and it limited the power of the Independent manufacturers, because it prevented Independents from selling or using the machines that they made in conjunction with the trust machines as they had previously done. That is not unlike the case of *Montague & Co.* v. *Lowry,* where the tile dealers' arrangement was upset, because in substance it provided that tile dealers out in California, who were independents, were prevented from getting tiles from the people they had previously gotten them from by virtue of this arrangement; so here the Independents were prevented from selling their machines to the people they had previously been selling them to.

The underlying principle of all those cases in this court is that when the combination acquires a power by virtue of the combination alone, whether it uses it or not, that is greater than the power possessed by the separate units, and which power enables them to impose terms on outsiders, that, then, is a violation of the act.

A word in conclusion on the effect of *Henry* v. *Dick Co.*, 224 U. S. 1. It may be said, and doubtless I presume will be argued, which is true, that each one of these machines is covered by a patent. They are all patented. The gentlemen say, "Inasmuch as we have got patents on the lasting machine, it was perfectly legal for us to combine and perfectly legal for us to say if you use our lasting machine we will lease our lasting machines to you, but if you use our lasting machines you must also use our welt-sewing and outsole-stitching machines and our heeling machines and our metallic fastening machines." They cite the case of *Henry* v. *Dick* to sustain that proposition.

What did *Henry* v. *Dick* decide? There was a case of a rotary mimeograph, where the machine was sold with the restriction that it could only be used with paper, ink, and stencils manufactured by the patentees. Somebody sold the paper, stencils, etc., for use with the machines. This court held, waiving all question of contributory infringement, that it was perfectly legal for the patentee to rent his machine with the restriction that it should only be used with paper, stencils, and ink furnished by such patentee. In the dissenting opinion attention was called to the reasons of public policy why the case should not be extended further than its precise facts. I call the court's attention to the fact that, in view of the particular facts of that case, all that was decided was that it was a valid license restriction, to say that you shall not use this machine except with certain things which were essential to be used in physical contact with the machine, and necessary for the performance of the functions of the machine; that is so because the license in that case related only to paper, stencils, and ink, which are things essential for the performance of the functions for which that particular

mimeograph was patented and invented, and must be used. So that the *Dick* case only decided that a license restriction was valid *which related to things that were to be used with the machine in connection with the performance of the functions of the machine itself.*

You will find on pages 45 and 46 of the Government's brief that we have gathered together the various quotations from the *Dick* opinion, to show that is as far as it went. You constantly refer to the validity of the license restriction "to use with other articles required in its practical operation," "the right to use only with other things proper for using with the machines"—"for use only in connection with supplies necessary for its operation," and again "a use only with other things necessary to the use of the patented article." In other words, you constantly repeat in that opinion that the restriction is valid where relating to the use of articles that are *to be actually used with* the machine itself. So much for what it exactly decides.

The next question is, Shall the principle of *Henry* v. *Dick* be extended to its logical conclusion? As a matter of pure logic, as a question of pure logical effect, you may extend the *Dick* case and say, "Why, if a patentee has the right to stipulate the condition on which his machine shall be used, you do not have to stop with the condition to use the things with the particular machine; but you can go ahead and make any other kind of conditions." And as a matter of pure logic you might extend it to its logical conclusion, and say, "You shall not use the rotary mimeograph machine, unless you agree only to use it in a building that has the roof painted with oxide of zinc."

I call your attention to the fact that in the dissenting opinion, the illustrations or fanciful suggestions made, with one exception, all relate to fanciful suggestions where the

restriction related *to use with* the machine, to wit, that a patentee may sell a coffee pot or a circular saw on condition that it shall be used only to boil coffee or saw logs obtained from the patentee. There is still a wide distinction between conditions relating to the use of the patented article with those things which are essential to its operation, and conditions bearing no such relation. The doctrine of *Henry* v. *Dick Co.* should not be extended to include the latter.

In *Standard Sanitary Manufacturing Company* v. *United States* the restriction had some relation to the use of the patented machine. That was where they used the patented thing to make an unpatented article, but this court dodged the question and said it was not necessary to decide it, and decided the case on the restriction of the jobbers, the legality of the jobbers' agreement.

So I will leave that argument here. This court can decide whether its wants to extend *Dick* v. *Henry* to that logical conclusion.

But even if you push it to the logical result and hold that it is legal to make such a license restriction on a patented article that the patentee can impose any restriction on earth, and may say that you can not use a mimeograph unless you also wear boots bought from the patentee; I say that even if you give it that fullest power, still that does not authorize the tying clauses. The tying clauses in effect say: "You shall not use my patented lasting machine unless you will also agree to use my heeling and metallic fastening machine." Yet the validity of such a tying clause must not be determined by what would be legal in an isolated, separate license restriction. It might be legal for a man to say you shall not use my lasting machine unless you will also agree to use my metallic fastening machine (which is entirely different and not necessary at all for the performance of

the functions of the lasting machine), yet when the adoption of the tying clause is not a mere isolated, single restriction on the use, but when it is in connection with a general scheme and whole plan, then no longer do the patent laws control. This general scheme by which they have tied up under this alleged restriction the use of all these machines, is not necessary either for the protection of the patents or of the legal monopoly as to any one of these machines. It is a way beyond what is necessary for the protection of the rights of the patentee to exclude others from using the patented machine. It simply becomes one step in a wide scheme. The patent laws give no universal license to do things which are prohibited by the Sherman law. So, in the opinion of the Government, the existence of these tying clauses can not be justified by the doctrine of *Henry* v. *Dick*.

HAS THE CRIMINAL APPEALS ACT BEEN REPEALED?

It is also contended by the defendants that the criminal appeals act was repealed by the adoption of the "Judicial Code," and therefore the writ of error should be dismissed. One word on that, because I want to have the court's mind on it when the defendants' counsel undertake to present it, which they probably will.

Briefly speaking, prior to the year 1907, the defendants had a right in a criminal case to come to the Supreme Court in either a capital criminal case or in a criminal case involving certain constitutional or jurisdictional questions; they could come direct to the Supreme Court under the fifth and sixth sections of the Circuit Court of Appeals Act.

On the other hand, the Government had no right to come here, either by writ of error or by certiorari under the decisions in *Dickinson* v. *U. S.*, 213 U. S. 92, and *U. S.* v. *Sanges*, 144 U. S. 310. In 1907 the criminal appeals act

was passed, giving the Government the right to come here in criminal cases.

Then the "Commission to Revise and Codify the laws of the United States" made its report in 1907, followed by what is known as the Joint Committee of Congress, in what is known as the Revision of 1910, which reports were preliminary to the adoption of the Judicial Code. They made a report to Congress, and that report contained Title XVI, called "The Judiciary."

In that "Judiciary" title, which contains 22 chapters, there was one chapter called the "Supreme Court," and the codifiers in Chapter Ten on the "Supreme Court" embodied those provisions of the law which gave the *defendant* the right to come here.

Then in another chapter, numbered 18, called "Procedure on Error and Appeal," they put in the provisions of the criminal appeals act which let the *United States* come here.

You will observe, then, that the codifiers—for some reason—put the *defendant's* right to come to the Supreme Court in one chapter (Chapter Ten on "The Supreme Court") and they put the *United States'* right to come here in *another* chapter (Chapter Eighteen on "Procedure on Error and Appeal"), and so reported to Congress.

When Congress came to pass the Judicial Code they did not see fit to cover the whole body of this revision, but they stopped right in between these two chapters; that is, between chapters 10 and 18. In other words, they only adopted the first 14 chapters of the proposed "Judiciary" title, which 14 chapters contained the provision giving the *defendants* the right to come here, leaving for future legislation the remaining eight chapters, which included the one on "Procedure on Error and Appeal," containing the right of the *United States* to come here. The repealing clause repeals everything incon-

sistent with the provisions adopted, but the portion adopted did not say anything about the right of the United States to come to the Supreme Court in criminal cases, so it did not attempt to repeal anything on that subject. I want to call attention that the repealing clause only applies to acts inconsistent with the "Judiciary" title, and while that title deals with the right of the *defendant* to come here, it does not include the *United States* because the codifiers saw fit to place the right of the United States to come here in a *different* chapter. Congress never reached that subject in its codification. I merely explain that phase, so you will understand why the criminal appeals act has never been repealed.

[Then followed the arguments of Chas. F. Choate, jr., and Frederick P. Fish, for the defendants in error.]

CONCLUDING ARGUMENT BY THE SOLICITOR GENERAL, WILLIAM MARSHALL BULLITT.

The SOLICITOR GENERAL. If the court please, the Government's brief is not very long, and for the reasons why this combination restrains trade, and why the patent laws do not afford it any protection, I shall just leave that on the brief, because I know that I could not possibly orally give it as well as it is given in the Government's brief; but in order to assist you in your conference on this case, I shall devote such time as I take now to dealing with matters that I hope to make so plain that you can get quickly down to the merits of the case.

First. The Chief Justice remarked toward the close of Mr. Fish's argument that if his argument were pressed to a conclusion it would destroy the patent law, as discouraging invention. I call your attention to page 19 of the indictment, where it charges that this combination was undertaken and had the effect of "discouraging and preventing others from inventing or manufacturing other devices and machines" in competition with the defendants' machines.

Second. Mr. Choate said that there were many other machines used in shoe manufacture other than the four, and that the Government contended that there were but four kinds of machines used in making shoes. Look in the Government's brief from one cover to the other, and you will never find the slightest suspicion of a suggestion that those four machines were the *only* machines used in the manufacture of shoes. I suppose what they referred to was a heading on page 23 of our brief which does state that the combination of seventy to eighty per cent of all the shoe machinery business in this country into one hand is in restraint of trade. I do not see how the use of the phrase "shoe machinery business" includes every kind of machinery that was used in the manufacture of shoes, for the use of "shoe machinery" there was in a sense a technical expression for this particular case; because on the first page of the indictment we find what is meant by the term "shoe machinery" as used in the indictment, to wit, these four kinds of machines. The indictment itself says that all the shoes worn by people in this country are manufactured by several different kinds of machines, referred to collectively in this indictment as "shoe machinery." So the term "shoe machinery" is used in our brief as it is used in the indictment; and as used in my argument and as used in the brief it refers to those four kinds of shoe machines.

Third, as to Mr. Fish's argument concerning the combination of noncompetitive business, and his analogy of a railroad; I say that his analogy did not state it exactly. He said that if there was a road from New York to Philadelphia, from Philadelphia to Baltimore and from Baltimore to Washington, was there anything wrong in combining the roads all together, and giving a through route from Washington to New York. He says that is all right. We fully

agree with him. But the analogy, if correctly drawn, would suppose that they made that combination of a through route from New York to Washington and then they said, "Anybody who travels from Washington to Baltimore on our train must also go from Baltimore to New York on our train, or we will put him off at Baltimore; for he shall not go from Baltimore to New York over somebody's else road."

Fourth. Mr. Choate said that the Government contended that there had been a reduction of twenty-four choices to two choices of quarrel or disagreement. There is not a word of that in the brief. The proposition that the Government makes is not that the opportunities for quarreling were reduced, but the possible choices by which a shoemaker could go out and get machinery to make his shoes were reduced from twenty-four to two. Regarding the footnote that he referred to, where he said that I had treated the Independents as a unit, whereas if they were treated as a large number it would greatly increase the number of choices, that is true. But if you treat the Independents not as a unit but as a number of different manufacturers, then the possible permutations resulting in the number of choices open to the manufacturer, as I say in the footnote, would be infinitely greater and the reduction would be far greater. Because, while instead of being reduced from twenty-four to two, perhaps (if there were forty or fifty Independents) the number of permutations and computations would be reduced from a number represented by a digit with propably twenty or thirty ciphers following it down to perhaps a number expressed by some hundreds, so that the reduction instead of being from twenty-four to two would be perhaps from many millions of possible combinations down to perhaps to a few thousands or hundreds of thousands. The point is, and what the brief undertakes to illustrate is, that

this progressive scheme carried out by these defendants resulted in an enormous reduction in the choice open to customers.

I do not care whether it is twenty-four to two or twenty-three hundred to three hundred—the liberty of the consumer or customer to purchase and acquire the machinery to fit out his factory has been curtailed.

The lower court's opinion.

The balance of my time shall be devoted to the consideration of this indictment and the opinion of the court. In the opinion of the Government, this indictment was never construed by the lower court at all, except in so far as there was a construction in favor of the Government. You will find in the record that the defendants objected to this indictment on, I think, seventy or eighty different grounds. Every conceivable argument was put forward as to why they were bad indictments. The court took up one objection after another to indictment 114, and disposed of them, and finally said that on the whole he was not much impressed with the defendants' criticisms, so far as they related to mere matters of form, with a single exception, which was that count No. 3 of No. 113 was bad for duplicity. Mind you, that count No. 3 was bad for duplicity, because it had by reference incorporated into itself counts one and two (Record, p. 80–82). And so the court held count No. 3 bad for duplicity, because it puts in counts one and two by reference, and the Government did not appeal from that decision.

I might say in passing, that when Judge Putnam says that count No. 3 is bad for duplicity, because it incorporates counts one and two, it would seem to indicate that counts one and two each were good, and that each alleged one complete offense. But he does not anywhere hold that counts one and two of indictment 113 were bad for duplicity.

The counsel for the defendants have paraphrased and have elaborated and have stated their views of the opinion at length, but I think when you come to critically examine the opinion you will find that their criticisms and their statements contained in the brief are really not justified, and this may help the court just a little, as I have given a good deal of study to that opinion.

Let us see exactly what the opinion does do. I call attention to the fact that Mr. Choate stated, and I acquiesce in it, that indictment 114 is not before this court. His language was that it "contained many allegations that were not in 113," and that indictment 114 "proceeded upon a totally different theory" from indictment 113. That being true, and indictment 114 not being before the court (except in so far as some of its provisions are quoted in the court's opinion) it is pretty hard to see how indictment 113 could have the same defects as 114, when counsel say 114 is totally different in its allegations and is framed on a totally different theory.

Furthermore, take up count No. 2 of No. 113. While Judge Putnam on page 81 of the record constantly refers to and deals fully with the repugnancy and duplicity of count *three*, he never says a word about counts one and two having that defect. The fact that he deals so elaborately with duplicity as a defect in the third count, from which the Government does not appeal, would seem to indicate, of course, there was no idea of duplicity in counts one and two. It is only by the most strained reference that counsel was able to import the idea that counts one and two were held bad for duplicity. What the court said on page 94 was that counts one and two of 113 are invalid for the same reason which invalidates the second count of 114. And then when you turn to see what he says about the second count of 114, you find that on pages 91 and 92 he takes up two pages to determine

that the second count in 114 is bad; but in that discussion there is not a suggestion in the two pages, from 91 to 93, with which the court deals with the second count in 114, that it is bad for duplicity—not a suggestion. So the only place that the court throughout the opinion deals with the second count of 114 is on pages 91 to 93, and there is no suggestion of duplicity about it. So that if the counts involved here of 113 were held bad for the same reasons as the second count of 114, it certainly can not be for duplicity.

Instead of looking for the reasons on pages 91 to 93, where the second count of 114 is dealt with at length, defendants' counsel in order to get the idea of duplicity turn back and seize on a statement on page 74; it is a mere general statement which does not use the word duplicity, and they claim that the court *meant* to decide by that language that the second count of 114 was bad for duplicity, and that therefore counts one and two in 113 were bad for duplicity. I think that that will have to be left, however, for the court to study out.

I might say in passing, however, that even if you hold—mark this, that even if you hold that the count is bad for duplicity under the Sherman law, is not that in itself a construction of the Sherman law, and therefore reviewable here? In other words, if the lower court says, even assuming that it said so, although it did not, that a count of an indictment is bad for duplicity because it charges two offenses under the Sherman law, is not that in and of itself a construction of the Sherman law?

Construction of the Sherman Law.

If the court says that two offenses are charged under the Sherman law, and it is, therefore, bad for duplicity, does not that require a construction of the Sherman law? Does not that require the exercise of the judicial function to say

what the Sherman law permits to be charged in an indictment? The very moment that you say that an indictment is bad for duplicity because it charges two offenses under the Sherman law, you are construing the Sherman law. The Government contends that it has only set forth one offense under the Sherman law, and that the Sherman law permits these facts to be stated as constituting a single offense under the Sherman law. The argument of the defendants is that this indictment charges, *first*, a merger into the United Shoe Machinery Company; and *second*, as an independent offense, the adoption of tying clauses, and that they constitute two offenses under the Sherman law. Judge Putnam certainly has held that there was *no* offense charged, because he said it is a legitimate, economic development. Now, then, if the court says there is *no* offense charged, because it is perfectly legitimate and perfectly proper, it is pretty difficult to see how *two* offenses are charged. In order to make an indictment bad for duplicity, *two* offenses must be charged, each of them complete in itself. That is the definition as found in Bouvier's Law Dictionary and the cases there cited.

Suppose that there was an indictment for murder, wherein the pleader alleged in one count that the man had broken into the house, and burned down the house, and burned the occupant, who thereupon died from it. It could not be said that that count was bad for duplicity, because it alleged the offense of housebreaking, arson, and murder, but only that the pleader had perhaps gone further than it was necessary for him to go (and he might be required on the trial to prove some things that were unnecessarily alleged), and in fact he had charged but one offense which was the charge of murder.

So here, it is conceivable that this count might be good if it had charged merely the original combination alone.

But what was really done, was the charge that they really undertook to restrain trade and in doing it they did these things, the formation of the United Shoe Machinery Co. and the adoption of the tying clause, which is precisely as in the *Kissel* case. The charge there was of the contract to lend money to Segal, and then to close the refinery and carry out the scheme; and the defendants there claimed that there were two offenses charged in the indictment, or rather that the real offense was the formation of the contract, and therefore was barred by the statute of limitations. But this court said "No"; and so here. It is a different form of statement of the same argument that was rejected in the *Kissel* case.

The Department Store Theory.

In conclusion, on the subject of the department-store idea, I have tried to make that perfectly clear on pages 32 and 33 of the brief, but I want just at the risk of repetition to say it once more. We fully concede that it is perfectly legal to combine noncompeting businesses so as to furnish a completed system of everything that is needed in one big business; but this case, as I said in the opening, presents the question as to whether—even though there be none of the unfair competition, even though there be none of the illegal methods adopted to bring about the combination which characterized the *Standard Oil* and *American Tobacco* cases—it is legal for the parties engaged in interstate commerce, even by legitimate means to go ahead and draw to themselves more and more and more trade until they shall have gotten to a size where they control an undue proportion of the interstate trade——

CHIEF JUSTICE WHITE. Of the particular States or the country?

SOLICITOR GENERAL BULLITT. Of the country. If I recall rightly—I might be mistaken in this—it was proposed in the first argument of the *American Tobacco* case——

CHIEF JUSTICE WHITE. The Attorney General in that case expressed the opposite of the position that you have taken and made no such contention, and further stated that the amount had not anything to do with it, and that he did not base any argument upon that.

SOLICITOR GENERAL BULLITT. My answer to that is—

First, it was not necessary in that case, because they had all the elements of unfair competition and could rely on that, and the Attorney General only meant for the purposes of the case, and I should not consider that it debarred us from making the contention here.

Second, if it is legal for a combination to gather together to themselves, not by unfair competition or illegal practices, but simply to combine together into one hand fifty or sixty or seventy or eighty or ninety or ninety-nine per cent of all the interstate business in a particular line, and is guilty of no unfair practices, and that is held to be perfectly proper, the sooner the business world knows it the better. It might be an attempt to monopolize and yet not be in restraint of trade, although you know no case has ever been decided in this court where anything was condemned under the monopoly section that was not first held to be bad under the first section of the act.

But, even passing that, the existence of the tying clauses of the leases as part of the scheme would render it illegal, even though the court should differ from the Government on the idea of the mere combination of seventy or eighty or

ninety or ninety-nine per cent of the business. Then, when you add the tying clauses, that is the part of the scheme which renders the whole thing in violation of the act.

I have tried not to take up the whole time, but found it was necessary to take that much time to get it fully before the court.

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In the Supreme Court of the United States

OCTOBER TERM, 1912

THE UNITED STATES, *Plaintiff in Error*

v.

SIDNEY W. WINSLOW, EDWARD P. HURD, GEORGE W. BROWN, WILLIAM BARBOUR, and ELMER P. HOWE

No. 620

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR DEFENDANTS IN SUPPORT OF THE FOLLOWING PROPOSITIONS:—

1. The combination of three owners of four different non-competing patented commodities, in the organization of the United Shoe Machinery Company, is neither a combination nor a conspiracy bad under the Sherman Act, and the District Court did not err in holding such organization good.

2. This proposition, however, a moot question, the district court having held the two counts bad for duplicity, which is not reviewable by this court.

3. The fact that the machines manufactured by the United Shoe Machinery Company are protected by letters-patent was not considered by the District Court in its construction of the Sherman Act, and is not open in this court.

4. The so-called "tying clauses" of the leases are not before this court on this record. They are simply an overt act.

5. Reply to brief of the United States.

WILLIAM A. SARGENT,
Of Counsel for Defendants.

HURLBURT, JONES & CABOT,
Of Counsel.

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INDEX.

	PAGE
PRELIMINARY STATEMENT	
Only a single question presented by the case	2
The lease question is not before this Court, as hereinafter shown	2
The fact that the machines manufactured by the United Shoe Machinery Company are protected by letters-patent was not considered by the District Court in its construction of the Sherman Act, and is not open in this Court	2
The Facts alleged in the First and Second Counts not brought out or erroneously stated by the United States	4
The facts of the second count	7
The Criminal Appeals Act and the Question before this Court	7
United States v. *Bitty*, 208 U. S. 393	8
United States v. *Keitel*, 211 U. S. 370	8
United States v. *Mason*, 213 U. S. 115	9
United States v. *Mescall*, 215 U. S. 26	9
United States v. *Stevenson*, 215 U. S. 190	9
United States v. *Kissel*, 218 U. S. 601	10
United States v. *Barber*, 219 U. S. 72	11
United States v. *Miller*, 223 U. S. 599	11
The District Court decided the Two Counts of Indictment 113, now before this Court, were Bad for Duplicity in Pleading, that is to say, on a Question of General Law not involving the Construction of the Sherman Act	11
United States v. *Keitel*, 211 U. S. 370	13
United States v. *Mason*, 213 U. S. 115	13
United States v. *Mescall*, 215 U. S. 26	13
United States v. *Stevenson*, 215 U. S. 190	13

PAGE

The District Court also held the Two Counts Bad on a Second Ground, namely, that the Original Organization of the United Shoe Machinery Company was neither a Combination in Restraint of Trade nor a Conspiracy in Restraint of Trade under the Sherman Act. By Such Decision the District Court construed the Sherman Act 15

United States v. *Stevenson*, 215 U. S. 190 17

The Fact that the machines manufactured by the United Shoe Machinery Company are protected by letters-patent was not considered by the District Court in its construction of the Sherman Act, and is not open in this Court 17

The District Court was not in Error in its Construction of the Sherman Act in Relation to Counts One and Two 19

The organization of the United Shoe Machinery Company by said defendants together, and the turning over by said groups of defendants to and the taking over by the United Shoe Machinery Company of the stocks and business of the three corporations, was not, and is not, a combination in restraint of defendants' own trade nor a conspiracy in restraint of trade of the shoe manufacturers in shoe machinery 19

United States v. *American Tobacco Co.*, 221 U. S. 106 . 20

(*a*) By the organization of the United Shoe Machinery Company there was no restriction of competition. The three groups of defendants, prior to the organization of the United Shoe Machinery Company, were not engaged in competition with each other. Their businesses were absolutely different, and each business related to a different commodity 21

PAGE

Kokomo Fence Machine Co. v. *Kitselman*, 189 U. S. 8 . 23
Addyston Pipe & Steel Company v. *United States*, 175 U. S. 211 24
Northern Securities Co. v. *United States*, 193 U. S. 197 25
Montague & Co. v. *Lowry*, 193 U. S. 38 26
Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U. S. 373 26
Shawnee Compress Company v. *Anderson*, 209 U. S. 423 26
Continental Wall Paper Co. v. *Voight & Sons Co.*, 212 U. S. 227 27
United Shoe Machinery Company v. *La Chapelle*, 212 Mass. 467 27
Swift & Co. v. *United States*, 196 U. S. 375 29
United States v. *John Reardon & Sons Company*, 191 Fed. 454 32
Standard Sanitary Mfg. Co. v. *United States*, 226 U. S. 20 33
United States v. *Union Pacific Railroad Company*, 226 U. S. 61 33
United States v. *Terminal Railroad Association*, 224 U. S. 383 34
United States v. *The Reading Company*, 226 U. S. — . 36

(*b*) By the organization of the United Shoe Machinery Company the defendants, taken individually, or in groups, or together, did not agree to restrain such trade as they had in different commodities, or in any manner to restrain their own trade 37

Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211 38
Montague & Company v. *Lowry*, 193 U. S. 38 38
Shawnee Compress Co. v. *Anderson*, 209 U. S. 423 . . 38

PAGE

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U. S. 227 38

Ellis v. *Inman, Poulsen & Co.*, 131 Fed. 182 38

The Standard Oil Co. of N. J. v. *United States*, 221 U. S. 1 38

United States v. *American Tobacco Co.*, 221 U. S. 106 . 38

Blount Mfg. Co. v. *Yale & Towne Mfg. Co.*, 166 Fed. 555 38

United States v. *Trans-Missouri Freight Association*, 166 U. S. 290 38

Swift & Company v. *United States*, 196 U. S. 375 . . 38

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U. S. 373 39

United States v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172 39

Bigelow v. *Calumet & Hecla Mining Co.*, 167 Fed. 721 39

(*c*) The combination created by the organization of the United Shoe Machinery Company "was purely an economic arrangement, not in violation of any rule in restraint of trade at common law, or which has been announced by the Supreme Court," 39

Joint Traffic Case, 171 U. S. 505 40

The combination of businesses, each dealing with a different commodity, into one corporation, has never been held a restraint of trade either at common law or under the Sherman Act 41

United States v. *American Tobacco Company*, 221 U. S. 106 41

United States v. *The Reading Company*, 226 U. S. — . 42

Union Pacific Coal Co. v. *United States*, 173 Fed. 737 . 42

United States v. *Standard Oil Co.*, 173 Fed. 177 . . . 43

(*d*) That the district court was right in the only construction of the Sherman Act now before this

PAGE

court, to wit, in holding that the organization of the United Shoe Machinery Company was not within the purview of the Sherman Act, is further apparent from the fact that such organization of the United Shoe Machinery Company had no direct or immediate effect upon interstate commerce. If it had any effect at all upon interstate commerce, such effect was accidental, secondary, remote, and not even probable 43

Bigelow v. *Calumet & Hecla Mining Company*, 167 Fed. 721 44

Anderson v. *United States*, 171 U. S. 604 46

Field v. *Barber Asphalt Paving Co.*, 194 U. S. 618 . . 46

Standard Oil Co. v. *United States*, 221 U. S. 1 . . . 46

Whether these Lease Provisions are or are not in Restraint of Trade is not before this Court for Several Reasons 47

1. These defendants are not indicted for making these lease provisions 47
2. The language of the indictment in regard to these leases 48
3. The act of the defendants in relation to these lease provisions only an overt act, and only one of three or four overt acts named in the same paragraph of indictment 49
4. The combination and conspiracy are each absolutely complete without this overt act. 49
5. The leases not a part of the combination or conspiracy. No original intent to change leases. No agreement to change leases 50
6. Leases not part of the original combination or conspiracy because between different parties . . 51
7. The question of duplicity on the theory of the United States 51
8. The lease provisions in these two counts were not construed or passed upon by the district court . 52

PAGE

9. If the lease provisions had been involved here, the district court would have considered the patent law 53
10. These defendants respectfully insist, therefore, that the question of the lease provisions is not before this court on this record 53

REPLY TO BRIEF OF THE UNITED STATES . . . 54

Preliminary statement 54
The entire argument of the United States in regard to the business of these defendants and of the United Shoe Machinery Company is based on the erroneous view that the machines of the defendants were all the machines used in shoe making 55
As a corollary to the above, the United States says that "these defendants control between seventy and eighty per cent. of the entire shoe machinery business in the United States" 55
On this record the particular form of the organization of the United Shoe Machinery Company, and the taking over of the capital stocks and business of the three original corporations is immaterial 56
Why indictment 113 was "curtly dismissed" by the district court 57
It was dismissed for duplicity 57
Why was the second count of indictment 114 not brought to this court by the United States? . . . 58
The defendants are not indicted for dominating the supply of shoe machinery 58
Reading Case, 226 U. S. 58
The argument of the United States fails absolutely, because the defendants are not indicted for dominating the supply of shoe machinery 59
The alleged competition before February 7, 1899 (the date of the organization of the United Shoe Ma-

PAGE

chinery Company), and the alleged competition after February 7, 1899 59

The argument of the United States, at pages 23–34, as to the effect of the organization of the United Shoe Machinery Company, is absolutely fallacious . . 62

The argument of the United States fallacious . . . 64

The particular patented machines of these defendants are not indispensable to the manufacturer of shoes by the admission of the United States in its brief 65

The dissatisfied shoe manufacturer mentioned by the United States is better off after the organization of the United Shoe Machinery Company than before 66

The organization of the United Shoe Machinery Company did not compel the customer to deal with the same group as to the four classes of machinery 67

All of the cases cited by the United States in this section of its brief relate to combinations of competitors dealing in the same commodity 68

These Defendants claim that the entire case of the United States, so far as the organization of the United Shoe Machinery Company is concerned, fails at once with the honest and frank admission of the United States, made in regard to the opinion of Judge Putnam 69

IT IS TO BE REMEMBERED

(a) That these Defendants are not indicted for monopolizing 70

(b) The Defendants' machines are patented and the Defendants entitled to one hundred per cent. of the trade therein 70

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, *Plaintiff in Error* *v.* SIDNEY W. WINSLOW, EDWARD P. HURD, GEORGE W. BROWN, WILLIAM BARBOUR, and ELMER P. HOWE.	No. 620.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR DEFENDANTS.

PRELIMINARY STATEMENT.

This case comes to this Court under the provisions of the Criminal Appeals Act of 1907, Chapter 2564, 34 Stat. 1246, providing for writs of error on behalf of the United States in certain criminal cases.

ONLY A SINGLE QUESTION PRESENTED BY THE CASE.

The one question involved in this writ of error under the Criminal Appeals Act is whether the district court erred in deciding that the organization of the United Shoe Machinery Company by said defendants together, and the turning over by said groups of defendants to, and the acceptance, taking over, and holding by the United Shoe Machinery Company of the stocks and business of the three corporations was neither a combination in restraint of defendants' own trade nor a conspiracy in restraint of trade of the shoe manufacturers in shoe machinery. The district court dismissed the two counts of this indictment, also on a separate ground, namely, for duplicity in pleading, that is, on a general question of law not reviewable by this Court under the Criminal Appeals Act.

THE LEASE QUESTION IS NOT BEFORE THIS COURT, AS HEREINAFTER SHOWN.

THE FACT THAT THE MACHINES MANUFACTURED BY THE UNITED SHOE MACHINERY COMPANY ARE PROTECTED BY LETTERS-PATENT WAS NOT CONSIDERED BY THE DISTRICT COURT IN ITS CONSTRUCTION OF THE SHERMAN ACT, AND IS NOT OPEN IN THIS COURT.

The defendants in error were indicted for violation of the Sherman Act, Anti-trust Act of July 2, 1890, the indictment containing three counts; the first count charging a combination to restrain the defendants' own trade in four kinds of patented shoe machinery, two groups of

defendants originally having a trade, each in one and one group (Storrow) in two different kinds of shoe machinery respectively, that is in different commodities, and the entire combined trade being limited to four kinds of machines manufactured under United States Letters Patent and leased to shoe manufacturers; the second count charging a conspiracy to restrain the trade of shoe manufacturers in said kinds of shoe machinery; the third count charging monopolizing trade in said kinds of patented shoe machinery. This indictment was numbered 113.

There was another indictment, numbered 114, in two counts, charging respectively:—

(1) Monopolizing trade in shoe machinery,

(2) Conspiring to monopolize trade in shoe machinery.

This second indictment is mentioned because only one opinion was rendered on the five counts of the two indictments.

The District Court sustained demurrers to each count of Indictment 113, held the first count of Indictment 114 sufficient in law, and sustained the demurrer to the second count of Indictment 114.

Only the first two counts of Indictment 113 are before this court on writ of error.

THE FACTS ALLEGED IN THE FIRST AND SECOND COUNTS NOT BROUGHT OUT OR ERRONEOUSLY STATED BY THE UNITED STATES.

The United States in its brief, at page 4, purports to quote from the indictment in stating "each group of machines performing a different and indispensable operation in the manufacture of shoes."

The indictment charges (italics ours),—

> "Such shoe machinery [machines of the four groups or classes of machines] has been and is *indispensable to the manufacture of such shoes in quantities sufficient to meet the demand for the same.*" (Record, p. 2.)

The United States is in error, in stating at page 4, par. 3, that "Prior to February 7, 1899, the manufacture of *shoe machinery* was distributed among several distinct groups of makers." This occurs throughout its brief.

It is only the manufacture of the best machines under letters-patent of the United States of the four different types of machines described at page 1 of the record that was distributed between said groups.

In the description of each group, to wit, the Consolidated group, the McKay group, and the Goodyear group, its brief omits the allegation that each group manufactured its particular type of machines under letters-patent of the United States.

In the foot-note at the bottom of page 5 of its brief is the statement that the four classes of machines referred to in the indictment were *all the machines used in shoe*

making. The indictment makes no such factitious allegation.

The brief states further, in said foot-note, that these defendants control between 70 per cent. and 80 per cent. of the *entire shoe machinery business* of the United States. This is only an amplification of the error in assuming that the four types of patented machines made by the defendants were all the machines used in shoe making.

The brief at page 6 states that the groups were non-competing except to the extent that the Goodyear group, making 10 per cent. of the lasting machines, was a competitor of the Consolidated group, which made 60 per cent. of the lasting machines.

The indictment does not allege that the Goodyear group was a competitor of the Consolidated group, and that proposition is a pure inference by the United States from the alleged fact (Record, p. 17) that one group manufactured a slight percentage of a class of machines belonging to the same general type as that manufactured by the other group. It is based on the theory that every lasting machine competes with every other lasting machine. This proposition will be discussed later.

The brief of the United States states on page 7 that "The various groups of defendants thereupon severally *turned over* to said United Shoe Machinery Co., and *caused* it to occupy [*sic*], take over, and hold the *capital stocks and business.*" N.B.—The possession, but not the legal title, to the real estate or tangible assets of the corporations controlled by the defendants.

This is an unwarranted interpretation of the language of the indictment (Record, p. 21), as will appear when the precise language, printed in a foot-note on page 8, of the brief of the United States, is examined.

In the second paragraph of said foot-note there are three stars, which indicate the omission from the indictment of the words printed in italics below.

This paragraph in the indictments reads as follows:—

> "And said defendants, *in so as last aforesaid carrying on, with the design and intent aforesaid, the interstate business, trade and commerce so formerly independently carried on by them by groups as aforesaid, have ceased to manufacture any of such shoe machinery at Boston or Lawrence aforesaid, and have manufactured all of the same at Beverly aforesaid, in said District of Massachusetts.*"

In the statement of the case the brief, at page 8, substitutes an unwarranted conclusion as to the effect of the so-called "tying clause" instead of the language of the indictment, which, however, is set out in full in the note at the foot of the same page.

The United States omits to mention the very important allegation and the one that is inconsistent and repugnant to all the previous allegations in the indictment (Record, p. 22):—

> "Said groups have ever been and now are, as said grand jurors, upon their said oath, charge the facts to be, independent of each other as aforesaid."

THE FACTS OF THE SECOND COUNT.

This count is almost identical, word for word, with the first count, except that an allegation is inserted to the effect that the shoe manufacturers, in obtaining shoe machinery from the defendants and others, were engaged in interstate commerce; and the charge of combination to restrain defendants' own trade is changed into a charge of conspiracy to restrain the trade of shoe manufacturers in shoe machinery.

THE CRIMINAL APPEALS ACT AND THE QUESTION BEFORE THIS COURT.

On this writ of error the question before this Court is whether the District Court erred in the construction of the Anti-trust Act of July 2, 1890, in its decision or judgment sustaining the demurrers to count one and count two of said indictment 113, if and so far as said Anti-trust Act is construed by the District Court in its opinion relating to these two counts.

The clause of the Criminal Appeals Act of March 2, 1907, Chapter 2546, 34 Stat. 1246, in question, is as follows:—

A writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court.

> . . . "From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judg-

ment is based upon the invalidity, or construction of the statute upon which the indictment is founded."

The following cases are leading cases where the Supreme Court has construed the Criminal Appeals Act.

In *United States* v. *Bitty*, 208 U. S. 393, the Supreme Court held, by Mr. Justice Harlan, at page 400, the Court below having sustained a demurrer and dismissed an indictment:—

> . . . "If a court of original jurisdiction errs in quashing, setting aside or dismissing an indictment for an alleged offense against the United States, upon the ground that the statute on which it is based is unconstitutional, *or upon the ground that the statute does not embrace the case made by the indictment*, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review. Hence—that there might be no unnecessary delay in the administration of the criminal law, and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced—the above act of 1907 was passed." (Italics ours.)

In *United States* v. *Keitel*, 211 U. S. 370, where the Court below quashed the indictments and there were also demurrers involved, it was held that only the particular question decided by the Court below, for which the statute provides, could be considered; that the whole case was not open to review in this Court on direct writ of error under the Act of March 2, 1907, and the questions of whether the Court below misconstrued the indictment, or whether there were such defects in the indictment that it was rightly quashed, irrespective of the construction of the statutes, were not before this Court.

In *United States* v. *Mason*, 213 U. S. 115, where there were special pleas in bar and also various grounds of demurrer to the indictment, and where the case went up upon the special pleas in bar, it was held, following *United States* v. *Keitel*, supra, that this Court could not consider the various grounds of demurrer to the indictment.

In *United States* v. *Mescall*, 215 U. S. 26, it was held that the inquiry of the Court was limited to the particular question decided by the Court below.

In *United States* v. *Stevenson*, 215 U. S. 190, Mr. Justice Day said, at page 194:—

> . . . "The District Court, upon demurrer to the indictment, held the second count thereof to be invalid, because the sole remedy for a violation of the statute was in a civil action for the recovery of a penalty under § 5 of the act. The court also held the second count bad because it did not sufficiently specify the acts of assistance constituting the alleged offense. . . .
>
> "From this statement it is apparent that the court below proceeded upon two grounds, one of which concerned the construction of the statute, the other of which decided the invalidity of the indictment upon general principles of criminal law. . . .
>
> . . . "We are here confronted with a case in which a decision of the court below sustaining a demurrer to an indictment involves not only the construction of a Federal statute, but another ground upon which the decision was also rested, which involves the sufficiency of the indictment on general principles.
>
> "The object of the criminal appeals statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offenses under such acts when this court should be of opinion that the statute, properly construed,

did in fact embrace an indictable offense. Inasmuch as the United States could not bring such a case here after final judgment, it was intended to permit a review of such decisions as are embraced within the statute, at the instance of the Government, in order to have a final and determinative construction of the act and to prevent a miscarriage of justice if the construction of the statute in the court below was unwarranted. . . .

"As the question of general law involved in the decision of the court below is not within either of the classes named in the statute, giving a right of review in this court, we must decline to consider it upon this writ of error."

At page 199:—

"We therefore reach the conclusion that the court erred in sustaining the demurrer to the second count of the indictment, so far as that ruling is based upon the construction of the statute in question."

In *United States* v. *Kissel*, 218 U. S. 601, at page 606, Mr. Justice Holmes said:—

"We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the act of March 2, 1907, c. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States* v. *Keitel*, 211 U. S. 370, 399. We think that there is a similar limit when the case comes up under the other clause of the act, from a 'judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.' This being so, we are not concerned with the technical sufficiency or redundancy of the indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged."

A similar view was also held by the Court in *United States* v. *Barber*, 219 U. S. 72, and in *United States* v. *Miller*, 223 U. S. 599, at page 602.

THE DISTRICT COURT DECIDED THE TWO COUNTS OF INDICTMENT 113, NOW BEFORE THIS COURT, WERE BAD FOR DUPLICITY IN PLEADING, THAT IS TO SAY, ON A QUESTION OF GENERAL LAW NOT INVOLVING THE CONSTRUCTION OF THE SHERMAN ACT.

That the decision of the district court was based upon general law as to the insufficiency of the pleadings, in that the respective counts were bad for duplicity, is shown by the following quotations from the opinion of the district court. While the determination of what the district court decided is slightly complicated by reason of the fact that the district court rendered but one opinion on the two indictments 113 and 114, so that the views of the court have to be picked out from various passages in the entire opinion, yet the district court has sufficiently and carefully indicated its reasons for its decision.

At page 94 of the record the court says:—

> "Indictment 113 is easily disposed of. We have already shown that the third count is invalid. The first and second counts are invalid for the same reason which invalidates the second count of indictment 114. This indictment 113 was evidently framed to bring out the question whether the fact that various machines manufactured by the United Shoe Machinery Company are protected by patents in whole or in part, is of importance in this connection. As the result we reach cuts under this

question, we prefer to postpone its consideration, hoping that the Supreme Court may have to dispose of it in some way before we are forced to proceed with it if ever." (Black letters ours.)

At page 73 of the record we find the following statement, referring to the second count of indictment 114, being the first reference of the district court thereto:—

"The offence under the first section permits in one count an allegation of only a single transaction, that is, an allegation of making one contract, or engaging in one combination or conspiracy, so that while, by virtue of the decisions of the Supreme Court in *United States* v. *Kissel*, 218 U. S. 601, 607, and *United States* v. *Barber*, 219 U. S. 72, 78, such a combination or conspiracy, when once effected, may be continuous, yet only one contract or one conspiracy can properly be alleged in any one count. **For this reason, as we go on, we will find that the second count, under the circumstances of the case, must be held invalid in law.**" (Black letters ours.)

At page 91 of the record the court proceeds as follows:—

"Taking up again the second count in indictment 114, which refers back for all details to the first count, it plainly alleges only a conspiracy. It states that the respondents 'unlawfully and knowingly conspired to monopolize.' This expression is plainly adapted to a combination only."

The court adds:—

"Coming back, therefore, to the proposition that the second count alleges only a conspiracy, the rules of pleading confine it to one conspiracy. As said in *United States* v. *Kissel*, 218 U. S. 601, *ubi supra*, and according to the clear rules of law, it may well be regarded as a continuous conspiracy. Never-

> theless, as was said on page 608, 'the contract is instantaneous,' though 'the partnership may endure as one and the same partnership for years'; adding, 'a conspiracy is a partnership in criminal purposes.'"

It therefore appears from the above quotations that the district court decided that the two counts were bad in that the first count sets forth more than one combination, and that the second count sets forth more than one conspiracy, and under the rules of pleading only one combination or one conspiracy can be set forth in one count.

Whether the district court erred in its determination upon this point is not before this Court at this time, under the Criminal Appeals Act, inasmuch as the determination of the question of pleading is the determination of a question of general law, has nothing to do with the construction of the Sherman Act, and is not within the classes named in the statute (Criminal Appeals Act) giving a right of review in this court.

United States v. *Keitel*, 211 U. S. 370.
United States v. *Mason*, 213 U. S. 115.
United States v. *Mescall*, 215 U. S. 26.
United States v. *Stevenson*, 215 U. S. 190.

It may be well to state briefly, however, a few facts showing that the district court was justified in holding, as it did, that there was more than one combination set out in the first count of indictment 113, and more than one conspiracy set out in the second count.

While it is probable from the allegation at Record, page 22, that the device of the United Shoe Machinery Company could be abolished and discontinued and the origi-

nal status re-established, that the United States intended in each count respectively to set out only one combination or conspiracy, to wit, the combination or conspiracy of the defendants in the organization of the United Shoe Machinery Company, and the turning over to said company of the stocks and business of the three original corporations, yet it was driven by the exigencies of its case not only to the argument set out most strenuously in its brief in the district court, that the defendants extended the scope of the illegal combination or conspiracy by means of the lease system devised and put in force by them, the system of leases themselves constituting a combination or conspiracy; but also to the argument that the two combinations or conspiracies taken together, with the other acts set forth, resulted in a third combination or conspiracy. We do not mean that the United States ever said in so many words, "Here are three combinations or conspiracies set out in one count," but that is the necessary and unavoidable result of this argument, and the district court was justified in so holding.

The United States also confirms this view by mentioning a "general scheme of combination," at pages 34 and 50 of its brief, and calls the leases "an additional step."

The District Court also held the Two Counts Bad on a Second Ground, namely, that the Original Organization of the United Shoe Machinery Company was neither a Combination in Restraint of Trade nor a Conspiracy in Restraint of Trade under the Sherman Act. By Such Decision the District Court construed the Sherman Act.

At page 94 of the record the district court says:—

"Indictment 113 is easily disposed of. We have already shown that the third count is invalid. The first and second counts are invalid for the same reason which invalidates the second count of indictment 114."

At page 91 of the record the district court says:—

. . . "the whole offence under the second count of indictment 114 [it is to be noted this count is not before this Court] is a combination formed on the seventh day of February, 1899, with the purposes and intentions then existing which we have described, and nothing more. This combination, then formed, was purely an economic arrangement, not in violation of any rule in restraint of trade at common law, or which has been announced by the Supreme Court, as is shown by an examination of all the cases decided by that tribunal.

"It seems to be impossible to deny that the combination of various elements of machinery, all relating to the same art and the same school of manufactures, for the purpose of constructing economically and systematically, and of furnishing any customer, the whole or any part of an entire system, is in strict and normal compliance with modern trade progress; as also it might be in strict compli-

ance with modern progress to limit the manufacture and supply to certain details, as, for example, steam gauges, wheels for railroad cars, or axles for steam locomotives, without furnishing anything else, although by so doing, the manufacturer of details becomes able to command the entire market. It is absolutely normal, and in accordance with the rightful demand of the market, for any dealer to supply mere details or an entire system of machinery, according as his customers may desire."

At the bottom of page 92, after some quotations from the Standard Oil and Tobacco Cases, the court proceeds further:—

"We have examined every decision of the Supreme Court bearing on these topics. Some of them, like *Gibbs* v. *The Gas Company*, 130 U. S. 396, 409, already referred to, and the *Freight Association case*, 166 U. S. 290, 335, were decided, or might have been, on the ground that they involved agreements for the suppression of corporations having a public character, which agreements are clearly illegal all over New England. All the other decisions involved a well-known rule which prohibits stifling bids and portioning out territory arbitrarily. In this is included *Oregon Steam Navigation Company* v. *Winsor*, already cited, with reference to the excess period of three years explained therein. None of them penalize a combination like that originally formed in the present case. Therefore we cannot adjudge it invalid."

At page 95 the district court says:—

"The general result is that, on the face of the record we hold the original agreement of consolidation valid." . . .

Notwithstanding the district court held counts one and two bad because the original organization of the United

Shoe Machinery Company was good, yet, in view of the determination by the district court of the invalidity of these two counts on another ground,—to wit, the question of pleading,—such decision and construction of the Sherman Act by the district court becomes a moot question in this particular case, as whether the district court is right or wrong in its decision that the organization of the United Shoe Machinery Company is good, and its construction thereby of the Sherman Act, yet this case is already decided on another ground; and, if this court should find that the district court erred in its decision and construction of the Sherman Act in regard to the validity of the original organization of the United Shoe Machinery Company, it would simply make an order, as it did in the case of *United States* v. *Stevenson*, 215 U. S. 190, supra, where the case there presented was decided upon two grounds,—one of general law and one of construction of the statute,—and say that the judgment should be reversed, and the case remanded for further proceedings in conformity with the opinion rendered.

THE FACT THAT THE MACHINES MANUFACTURED BY THE UNITED SHOE MACHINERY COMPANY ARE PROTECTED BY LETTERS-PATENT WAS NOT CONSIDERED BY THE DISTRICT COURT IN ITS CONSTRUCTION OF THE SHERMAN ACT, AND IS NOT OPEN IN THIS COURT.

The district court expressly declined to construe the Sherman Act in respect to the allegations that the business of each group of the defendants was "carried on under letters-patent of the United States."

The specific question presented by counts one and two respectively, and which the defendants were entitled to

have decided, at least before the counts were held good by the court, was whether the fact that letters-patent upon the machines manufactured and owned by the corporations which the defendants are alleged on February 7, 1899, to have merged into one corporation, rendered such combination or merger, and the leases subsequently given, valid, even if the same would have been otherwise invalid for any cause under the Sherman Act.

That question the district court declined to pass upon, inasmuch as it regarded it unnecessary for decision in view of the fact that, in so far as it construed the Sherman Act, it held the combination good irrespective of the patent question.

At page 94 of the record the district court says:—

> "This indictment 113 was evidently framed to bring out the question whether the fact that various machines manufactured by the United Shoe Machinery Company are protected by patents in whole or in part, is of importance in this connection. As the result we reach cuts under this question, we prefer to postpone its consideration, hoping that the Supreme Court may have to dispose of it in some way before we are forced to proceed with it if ever."

Even if the district court erred in its construction of the Sherman Act, and did not decide counts one and two invalid on a question of pleading or a question of general law, yet the specific question presented by this indictment, which the defendants have a right to have decided before the counts are held valid, has not been decided, and is not before this court at the present time, and the case would have to go back to the district court for decision upon that proposition.

THE DISTRICT COURT WAS NOT IN ERROR IN ITS CONSTRUCTION OF THE SHERMAN ACT IN RELATION TO COUNTS ONE AND TWO.

The organization of the United Shoe Machinery Company by said defendants together, and the turning over by said groups of defendants to and the taking over by the United Shoe Machinery Company of the stocks and business of the three corporations, was not, and is not, a combination in restraint of defendants' own trade nor a conspiracy in restraint of trade of the shoe manufacturers in shoe machinery.

The first count charges a mutual restraint of trade, or a restraint of defendants' own trade, as distinguished from extraneous restraint of trade, or the restraint of trade of the general public or of others. This is shown (*a*) by the allegation as to the original methods of carrying on the trade approved by the United States:—

> "that said groups of defendants then were separate from and independent of each other so far as their said several enterprises were concerned, and by reason of that fact each of said groups then carried on, *as it should*, its own portion of said interstate business, trade and commerce independently, and free from any self-restraint and from any control or restraint by or on account of the other groups, as to their choice of customers among said shoe manufacturers, as to the number of shoe machines they would sell or lease to such shoe manufacturers, as to the prices or rental they would exact and obtain from said shoe manufacturers for their shoe machinery, and as to the terms upon which they would sell or lease their shoe machinery to said shoe manufacturers, those

> being matters important in and vital to the carrying on of such interstate business, trade and commerce by said several groups respectively" . . . (Record, p. 18). (Italics ours.)

(*b*) By opinion of district court. (Record, p. 81.)

(*c*) By statement of the United States in its brief (p. 3).

The second count charged a conspiracy in restraint of the trade of shoe manufacturers in shoe machinery.

The words "restraint of trade" have been graphically and concisely defined by the Supreme Court of the United States in the opinion of Mr. Chief Justice White in *United States* v. *American Tobacco Co.*, 221 U. S. 106, at page 179. The court there says:—

> . . . "Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words 'RESTRAINT OF TRADE' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose." (Capitals ours.)

In accordance with this definition, applying the rule of reason to the only question under the Sherman Act

construed by the district court, namely, as to whether or not the original organization of the United Shoe Machinery Company was or was not in restraint of trade under the Sherman Act, it is apparent such organization of the United Shoe Machinery Company and the turning over by said groups of defendants to it of the stocks and business of the three corporations is not a restraint of interstate trade, and does not come within Mr. Chief Justice White's definition or within the Sherman Act.

(*a*) BY THE ORGANIZATION OF THE UNITED SHOE MACHINERY COMPANY THERE WAS NO RESTRICTION OF COMPETITION. THE THREE GROUPS OF DEFENDANTS, PRIOR TO THE ORGANIZATION OF THE UNITED SHOE MACHINERY COMPANY, WERE NOT ENGAGED IN COMPETITION WITH EACH OTHER. THEIR BUSINESSES WERE ABSOLUTELY DIFFERENT, AND EACH BUSINESS RELATED TO A DIFFERENT COMMODITY.

One group, defendants Winslow, Hurd, and Brown, were directors of and large stockholders in the Consolidated & McKay Lasting Machine Company (Record, p. 16), and were carrying on, under the name and through the instrumentality of said Consolidated & McKay Lasting Machine Company, the business of manufacturing such lasting machines, under letters-patent of the United States, to such an extent that they manufactured the larger portion, to wit, sixty per cent. of all such lasting machines manufactured in the United States. (Record, p. 17.)

The second group, James J. Storrow, was a director of and large stockholder in the McKay Shoe Machinery Company. (Record, p. 16.) Said Storrow was carrying on, under the name and through the instrumentality of said McKay Shoe Machinery Company, the business of manufacturing heeling machines and metallic fastening machines, under letters-patent of the United States. He manufactured the larger portion—to wit, seventy per cent.—of all such heeling machines, and the larger portion—to wit, eighty per cent.—of all such metallic fastening machines manufactured in the United States. (Record, p. 17.)

The third group, defendants Barbour and Howe, were carrying on, under the name and through the instrumentality of the Goodyear Shoe Machinery Company, the business of manufacturing welt sewing machines and outsole stitching machines and lasting machines, under letters-patent of the United States. They manufactured the larger portion—to wit, eighty per cent.—of such welt sewing machines and outsole stitching machines, and a large portion—to wit, ten per cent.—of all such lasting machines manufactured in the United States. (Record, p. 17.)

That the business of manufacturing a lasting machine is different from the business of manufacturing a heeling machine, and a metallic fastening machine, and that each business relates to a different commodity, requires no argument. That the business of manufacturing a welt sewing machine and an outsole stitching machine is different from the business of manufacturing a lasting machine, or manufacturing a heeling machine or manufacturing a metallic fastening machine, and that each business relates to a different commodity, requires no

argument. Incidentally, defendants Barbour and Howe were manufacturing lasting machines to the extent of ten per cent. It might be argued that that last-named group were in competition with the first group, Winslow, Hurd, and Brown, who manufactured sixty per cent. of all lasting machines, but it is to be borne in mind that each group manufactured its own lasting machines under letters-patent of the United States; that unquestionably these lasting machines were radically different from each other, and possibly not intended for use upon the same kinds of shoes, otherwise letters-patent of the United States, which are granted only for new and useful improvements, would not have been granted to the respective defendants.

In *Kokomo Fence Machine Co.* v. *Kitselman*, 189 U. S. 8, at page 23, Mr. Chief Justice Fuller said,—

> . . . "The presumption from the grant of the letters patent is that there was a substantial difference between the inventions."

Furthermore, there is no claim by the United States, in either count of said indictment, that these groups, or any of them, were engaged in competition with each other or any group with another.

All the Supreme Court cases, and the cases decided in the lower Federal Courts relating to mutual restraint of trade are absolutely different from the case at bar. While it seems sufficiently obvious from the mere statement of the facts that such is the case, in view of the Supreme Court cases cited by the United States in the district court, it is well enough to point out more specifically than the district court did the radical difference between the innocent and praiseworthy combination in

the case at bar and the various combinations described in the Supreme Court cases.

The Addyston Case.

In *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, the six corporation defendants were engaged in the manufacture, sale, and transportation of cast-iron pipe, (Opinion, p. 213) the same commodity.

In this case it was agreed between the six corporation defendants that there should be no competition between them in the thirty-six States and Territories. (Opinion, p. 213.) The intention and purpose of the combination was to increase the price of pipe, "and the latter result was to be achieved by abolishing all competition between the parties to the combination." (Opinion, p. 240.)

At page 244, in answer to an argument, the court says:—

> . . . "This takes no heed of the purpose and effect of the combination to restrain the action of the parties to it so that there shall be no competition among them to obtain the contract for themselves.
>
> . . . "It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce."

In other words, this case is a case of combination of competitors to destroy existing and future competition.

The Northern Securities Case.

In *Northern Securities Co.* v. *United States*, 193 U. S. 197, in which the Northern Securities Company, the holding company, bought the majority of the capital stock of two competing and parallel roads, and such combination was held bad as a restraint of trade, the opinion of Mr. Justice Harlan is permeated throughout with the idea that the competition which would otherwise have existed between the two competing roads was destroyed by the ownership of the capital stock of these roads by the holding company.

In a forty-four-page opinion, the court uses the words "competitor," "competitive," or "competing" upwards of sixty different times.

In the Northern Securities case there was no fusion of the businesses. Only the capital stocks or a portion thereof were taken over. The Northern Securities Company case was a combination of competitors to destroy existing and future competition.

In the present case the United Shoe Machinery Company, a manufacturing and business corporation, took over the stocks and business of three non-competitive manufacturing and business corporations, each manufacturing and leasing a different commodity, and by such taking over absorbed the same into one corporation. We have here the community or unity of interest referred to by Mr. Justice Holmes in the Northern Securities case, 193 U. S., at page 404, such community of interest being established by the fusion of the three companies engaged in the business of manufacturing and leasing non-competing, complementary machines covered by letters-patent of the United States, and constituting different commodities, into one corporation.

Montague & Co. v. Lowry.

In the case of *Montague & Co.* v. *Lowry*, 193 U. S. 38, we have a combination of manufacturers and dealers in tiles, mantels, and grates, in which the manufacturers agreed not to sell to any one not a member, and the dealers agreed not to purchase from manufacturers who were not members, and also not to sell to any one not a member for less than list prices, which were more than fifty per cent. higher than the prices to members. In this case all of the parties were clearly in competition with each other and dealing in the same commodities, and the agreement undoubtedly restrained trade, but it does not in any respect resemble the combination in the case at bar. This case was a combination of competitors to destroy existing and future competition.

In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, the objects of the combination there held to have been formed by identical contracts were to destroy competition and to fix prices. (See pp. 399, 400.)

In the case of the *Shawnee Compress Company* v. *Anderson*, 209 U. S., page 423, the Supreme Court sustained the ruling of the Supreme Court of the Territory of Oklahoma, that court having found as a fact that the lease in question was made in aid of a conspiracy to suppress competition and secure a monopoly and was void, there being proof that the lessor company agreed not only to go out of the field of competition and not to enter that field again, but had further agreed to render every assistance to prevent others from entering. The parties were competitors in the same business, dealing with the

same commodity, and the contracts to restrain competition were clearly in restraint of trade.

The Wall Paper Case.

In the case of *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, a number of manufacturers situated in different States, engaged in manufacturing an article sold in different States, organized a selling company, of which the manufacturers owned the capital stock and through which their entire output was sold, in accordance with an agreement between themselves, to such persons only as entered into a purchasing agreement by which their sales were restricted. Here, again, the parties to the combination were competitors, engaged in manufacturing and selling the same commodity, and the agreement was clearly bad in restraint of trade. The case bears no resemblance whatever to the case at bar.

The La Chapelle Case.

In *United Shoe Machinery Company* v. *La Chapelle*, 212 Mass. 467, the United Shoe Machinery Company brought a suit in equity for the specific performance of a contract made by the defendant to assign to the company a patent taken out by the defendant, who had contracted to assign to the company all patents taken out by him.

The defence was that the plaintiff company "was constituted by the combination of seven or more preexisting corporations competing with each other in two-thirds of the States of the Union, being all the principal shoe machinery manufacturers in the United States, and

that by their merger into the single organization of the plaintiff, it acquired monopolistic control of the business; . . . that it has achieved and maintained its monopoly . . . by contracting with 95 per cent. of the inventors of shoe machinery for the entire product of their inventive skill, . . . and that by these means it has stifled competition, . . . and that the contract in suit was made in furtherance of that monopoly . . . ."

The court below ruled that no evidence was admissible under this averment of the answer, and excluded the evidence offered. The Appellate Court said, among other things:—

> "It is to be observed that the averment of the answer is positive and direct that the plaintiff has acquired and maintained a monopoly of interstate trade in shoe machinery, and the offer of proof in this regard was co-extensive with the averment. . . . We are not called upon to apply that rule [the rule in the Standard Oil Case] because this record presents as its hypothesis an existing and absolute monopoly of a branch of interstate commerce founded upon a combination. . . . But whatever may be the precise definition of the word monopoly as used in this statute, a business device by which a considerable number of competing corporations are welded into a single corporate entity which controls from 90 to 95 per cent. of the commerce of the country in a particular branch required for the economical production of a necessity of mankind, is a monopoly."

In this case we have as the hypothesis upon which all the conclusions of the court are predicated a combination of seven or more pre-existing corporations competing with each other.

It is to be further noted that the case went up to the

Supreme Court on an offer of proof, and not on a demurrer. The complainant did not stand before the court in this case as admitting for a moment the putative, hypothetical facts alleged in the answer. The Appellate Law Court has to deal with facts as they are alleged, and not with facts as they exist.

This case was decided by the Supreme Court purely on the proposition that a combination of competing concerns—that is to say, concerns dealing with the same commodities—creates a monopoly under the statute.

In other words, this case was a combination of competitors, and does not bear the slightest resemblance to the case at bar.

The Swift Case.

The case of *Swift & Co.* v. *United States*, 196 U. S. 375, in no way resembles the case at bar. The Swift case came before the Supreme Court on appeal from a decree of the Circuit Court on demurrer, the decree granting an injunction, and the Supreme Court considered both the bill and the decree. Mr. Justice Holmes summed up the bill as follows, at page 394:—

> . . . "it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different States, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates

from the railroads to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination."

At page 395:—

. . . "It will be noticed further that the intent to monopolize is alleged for the first time in the eighth section of the bill as to raising, lowering and fixing prices. In the earlier sections, the intent alleged is to restrain competition among themselves. But after all the specific charges there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meats throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill. . . . This bill seems to us intended to allege successive elements of a single connected scheme. . . .

"The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time and space, that something of the same impossibility applies to them."

At page 396:—

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a

> body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens* v. *Wisconsin*, 195 U. S. 194, 206."

This case is totally different from the case at bar for the following reasons:—

1. In the Swift case there is a combination of competitors—that is to say, of persons engaged in the same business and dealing in the same commodity—to fix prices and restrict shipments; in short, to prevent competition both mutually and extraneously. In the case at bar there is no combination of competitors.

2. In the Swift case the parties agreed together to do everything that they were charged with doing,—at least six different and distinct things,—and agreed to restrain their own trade. In the case at bar there is no agreement by the defendants to restrain their own trade, and there was no agreement even to form the corporation. They simply formed it.

3. In the Swift case it is plain that there was a preconceived plan or scheme embodying the constituent elements set out in the opinion. The constituent elements were so transitory and constantly changing that they could not have been formulated except by a preconceived plan.

In the case at bar there was no plan at all except in so far as it was embodied in the organization of the corporation. The other acts alleged to have been done by the defendants in the case at bar had no necessary or

other connection with the combination, but are totally distinct and isolated facts, and are not bound to or connected in any way with the original organization of the corporation.

4. The following quotation from Judge Putnam's opinion in *United States* v. *John Reardon & Sons Company*, 191 Fed. 454, at page 456, seems peculiarly appropriate in this connection when applied to the case at bar: —

> . . . "There are no circumstances, there is nothing to give color to these transactions, as a part of a conspiracy, as there was in the Swift Case. . . . The allegations here are very naked. There is nothing to give any color of illegality to them whatever."

The Tobacco Case and the Standard Oil Case are referred to in the opinion by the district court, so that it is unnecessary to discuss the facts of the same.

But it appears from the Tobacco Case that each of the six corporations there concerned was in turn originally a combination of competing concerns engaged in the manufacture and sale of competing commodities, and these corporations and their different businesses were shifted around, sold, and resold to each other at the will of the conspirators in their successful efforts to control a monopoly.

It is enough to say that both the Standard Oil and the Tobacco Cases are based upon a constant, persistent suppression of competition, extending over a long period of years and embodying in their scope and plan almost every imaginable means of suppressing competition.

The Bath-Tub Case

In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, there was a combination of independent and competing manufacturers dealing in the same commodity. The court says at page 48:—

> "The agreements in the case at bar combined the manufacturers and jobbers of enameled ware very much to the same purpose and results as the association of manufacturers and dealers in tiles combined them in *Montague & Co.* v. *Lowry*, 193 U. S. 38, which combination was condemned by this court as offending the Sherman law."

This latter case has already been discussed heretofore in this brief, and the same comment is appropriate as made in that case.

In the Bath-tub Case all of the parties were clearly in competition with each other, and dealing in the same commodities, and the agreement undoubtedly restrained trade, but it does not in any respect resemble the combination in the case at bar. In other words, this case was a combination of competitors to destroy existing and future competition.

In the case of *United States* v. *Union Pacific Railroad Company*, 226 U. S. 61, decided December 2, 1912, there was a combination of independent and competing railroads dealing in the same commodity, to wit, transportation. The court says at page 86:—

> "A more effectual form of combination to secure the control of a competing railroad than for one road to acquire a dominating stock interest in the other, could hardly be conceived."

In other words, this railroad case is the ordinary case of a combination of competitors dealing in the same commodity, was clearly bad under the Anti-trust Act, and does not in any respect resemble the combination in the case at bar.

The St. Louis Terminal Case.

The case of *United States* v. *Terminal Railroad Association*, 224 U. S. 383, is a case of direct and immediate effect upon interstate commerce by combination of three competing railroad terminal facilities into one, the one being owned by fourteen competing railroad companies out of twenty-four railroads converging at St. Louis. Each of said fourteen railroads could veto the entrance of any other railroad. The Supreme Court, following the Missouri state court, says the combination was not one of competing and parallel railroads, so not bad under the Northern Securities case. The case, however, rests upon the geographical situation of St. Louis, rendering it impossible for other competing roads to obtain access to the City except over the tracks of the Terminal Association.

The court said at page 405:—

> "It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, *and we base our conclusion in this case, in a large measure, upon that fact.* The 'physical

> or topographical condition peculiar to the locality,' which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities." (Italics ours.)

There are numerous radical distinctions between this case and the case at bar.

1. This case presents a combination of competitors in terminal facilities, pure instruments of interstate commerce, dealing in the same commodity, to wit, transportation both ways between East St. Louis and St. Louis.

2. The business is of a public nature.

3. It directly deals with and affects interstate trade, its very object being for the most part interstate trade between Illinois and Missouri.

4. The case was decided in a large measure upon the physical or topographical condition peculiar to the locality in St. Louis and East St. Louis. (Opinion, p. 405.)

5. Each of the fourteen proprietary companies had a veto upon any joint use or control of the terminals by any non-proprietary company.

6. In the case at bar these defendants are not a combination of competitors. Each group dealt in a different commodity.

7. No shoe manufacturer is compelled to use defendants' machines. He can use the patented or unpatented shoe machinery of the Independents. In our case, using a transportation term, we furnish Pullman service to shoe manufacturers—they can manufacture shoes without this service.

8. These defendants are entitled, under the patent law, to a complete monopoly in every machine they manufacture.

9. No claim is made but what every shoe manufacturer is treated exactly alike.

The Reading Case.

The case of *United States* v. *The Reading Company*, 226 U.S. , is the case of a combination of numerous competing railroads and coal mining companies.

The competition was, for the most part, a double one. The railroads dealt and competed in two different commodities—transportation and coal. The coal companies dealt only in coal.

The defendant carrier companies and coal mining companies owned or controlled about ninety per cent. of the entire *unmined area* and produced about 75 per cent. of the annual supply of anthracite.

The Independents produced about twenty per cent. of the annual anthracite supply.

Two combinations were held bad.

1. The Temple Iron Co. combination,
2. The sixty-five per cent. contract combination.

The Temple Iron Company combination was in restraint of a two-fold competition: (*a*) a combination of actual competitors in coal; (*b*) a strangling of a projected railroad competition; and clearly bad under the Sherman Act in either aspect.

The sixty-five per cent. contract combination constituted also a double combination of competitors in the same commodity.

The defendant carriers, themselves competitors, agreed among themselves, as competitors in the same commodity, to make the sixty-five per cent. contracts, containing provisions "agreed upon beforehand by the defendant carriers in concert," with their competitors, the independent coal operators, some contracting with some operators, and some with others for their total present or future output of coal, the contracts being perpetual.

That the case relating to these contracts "is of such an unreasonable character as to be within the authority of a long line of cases" decided by the Supreme Court, there can be no possible question. The case rests entirely on a combination of competitors, and is totally different from the case at bar—these defendants did not compete, but dealt in different commodities.

(*b*) BY THE ORGANIZATION OF THE UNITED SHOE MACHINERY COMPANY THE DEFENDANTS, TAKEN INDIVIDUALLY, OR IN GROUPS, OR TOGETHER, DID NOT AGREE TO RESTRAIN SUCH TRADE AS THEY HAD IN DIFFERENT COMMODITIES, OR IN ANY MANNER TO RESTRAIN THEIR OWN TRADE.

On the question of defendants restraining their own trade, another important fact is to be noticed with reference to the combination charged. Nowhere in the count is there any allegation that the defendants either individually or by groups or together *agreed* to restrain their own trade.

So far as appears from either count in said indictment, on the afternoon of February 7, 1899, the day on which the alleged combination was entered into, and after the formation of the United Shoe Machinery Company and its taking over the business of the three corporations, and

on every day thereafter down to the present day, each of said defendants had perfect liberty to engage in a business dealing with the same commodities with which he had previously been engaged, and in competition with the same commodities with which he had previously been engaged, and in competition with any business of the United Shoe Machinery Company. In other words, there is no agreement charged wherein or whereby either of said defendants *agreed* to restrain his own trade.

In almost every case cited by the United States in the district court, or applicable to the present case, there was an agreement by the parties to restrain their trade as competitors.

In each of the following cases there was an agreement, either admitted or clearly and definitely proved.

Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211, 213.

Montague & Company v. *Lowry*, 193 U. S. 38.

Shawnee Compress Co. v. *Anderson*, 209 U. S. 423.

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U. S. 227.

Ellis v. *Inman, Poulsen & Co.*, 131 Fed. 182.

The Standard Oil Co. of N. J. v. *United States*, 221 U. S. 1.

United States v. *American Tobacco Co.*, 221 U. S. 106.

Blount Mfg. Co. v. *Yale & Towne Mfg. Co.*, 166 Fed. 555.

United States v. *Trans-Missouri Freight Association*, 166 U. S. 290.

Swift & Company v. *United States*, 196 U. S. 375.

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U. S. 373.
United States v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172.

In the case of *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. 721 (not cited by the Government below), this proposition is very clearly set forth by Mr. Justice Lurton (then Circuit Judge). He says, at page 731:—

> . . . "No express agreement is shown by which anything is to be done or left undone from which an unlawful restraint must, or will, probably happen. The case differs from all of the cases appealed to by the learned counsel for appellants in this important particular."

(*c*) THE COMBINATION CREATED BY THE ORGANIZATION OF THE UNITED SHOE MACHINERY COMPANY "WAS PURELY AN ECONOMIC ARRANGEMENT, NOT IN VIOLATION OF ANY RULE IN RESTRAINT OF TRADE AT COMMON LAW, OR WHICH HAS BEEN ANNOUNCED BY THE SUPREME COURT."

Opinion of Judge Putnam, Record, p. 91.

> "It seems to be impossible to deny that the combination of various elements of machinery, all relating to the same art and the same school of manufactures, for the purpose of constructing economically and systematically and of furnishing any customer, the whole or any part of an entire system, is in strict and normal compliance with modern trade progress;" opinion of Judge Putnam, Record, p. 91.
>
> "We have examined every decision of the Supreme Court bearing on these topics. . . . None of them

> penalize a combination like that originally formed in the present case." Opinion of Judge Putnam, Record, pp. 92–93.

In the absence of cases bearing upon this subject, we must resort to first principles and to dicta in the various cases.

It was suggested by counsel in the argument of the *Joint Traffic Case*, 171 U. S. 505, referred to by the Court, at pages 567 and 568, in 1898, and before the organization of the United Shoe Machinery Company, that, under the broad interpretation of the Sherman Act then claimed by the Government, the formation of a corporation to carry on any particular line of business *by those already engaged therein* would be contrary to statute.

> *Note*, that in the case at bar, however, the individual defendants, by groups, or otherwise, were not "already engaged" in the same business, but were manufacturing and dealing in different commodities.

But the Supreme Court, even in those early days, when it was claimed that the Supreme Court had held every act in restraint of trade was bad, whether it was reasonable or unreasonable, said, by Mr. Justice Peckham, in its opinion, in answer to such suggestion of counsel, at pages 567, 568:—

> . . . "Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. . . .
>
> "We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer,

merchant or manufacturer, restrained commerce or trade within any legal definition of that term;"

The Court further adds at page 568:—

> ... "We also repeat what is said in the case above cited [*Hopkins* v. *United States*] that 'the Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it'. To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

The combination of businesses, each dealing with a different commodity, into one corporation, has never been held a restraint of trade either at common law or under the Sherman Act.

Mr. Chief Justice White, in *United States* v. *American Tobacco Company*, 221 U. S. 106, at page 179, says, referring to the Standard Oil case:—

> ... "It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose."

At page 181, referring to normal and usual contracts, he says,—

> "the right to make which were necessary in order that the course of trade might be free . . ."

In *United States* v. *The Reading Company*, 226 U. S. , the right to make normal and usual contracts was affirmed, Mr. Justice Lurton saying at page 24:—

> "That the act of Congress 'does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose,' was pointed out in the *Standard Oil* case, 221 U. S. 1. In that case it was also said that 'the words "restraint of trade," should be given a meaning which would not destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect.' We re-affirm this view of the plain meaning of the statute . . ."

In *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737, the Court, consisting of Circuit Judge Sanborn and Mr. Justice Van Devanter, then Circuit Judge, and District Judge Munger, the opinion being by Judge Sanborn, said, at page 739:—

> "The act of July 2, 1890, does not denounce every combination to engage in or to conduct commerce among the states or with foreign nations, but those combinations alone which restrain that commerce. It does not denounce every combination which restrains that commerce, but those combinations only, the necessary effect of which is to stifle, or directly and substantially to restrict, free competition in that commerce . . ."
>
> "If the necessary effect of a combination to engage in or conduct interstate or international commerce is but incidentally and indirectly to restrict competition therein, while its chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban

of this law. *Hopkins* v. *United States*, 171 U. S. 573, 592, 19 Sup. Ct. 40, 43 L. Ed. 230; *Anderson* v. *United States*, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 458, 60 C. C. A. 290, 294, 64 L. R. A. 689, and cases there cited. There are lawful and unlawful combinations of persons conducting interstate and international commerce, and undoubtedly the former vastly outnumber the latter. There is no presumption that two or more persons who have combined to conduct interstate or international commerce are guilty of a combination in restraint of that commerce."

See also *United States* v. *Standard Oil Co.*, 173 Fed. 177, at page 188.

(*d*) THAT THE DISTRICT COURT WAS RIGHT IN THE ONLY CONSTRUCTION OF THE SHERMAN ACT NOW BEFORE THIS COURT, TO WIT, IN HOLDING THAT THE ORGANIZATION OF THE UNITED SHOE MACHINERY COMPANY WAS NOT WITHIN THE PURVIEW OF THE SHERMAN ACT, IS FURTHER APPARENT FROM THE FACT THAT SUCH ORGANIZATION OF THE UNITED SHOE MACHINERY COMPANY HAD NO DIRECT OR IMMEDIATE EFFECT UPON INTERSTATE COMMERCE. IF IT HAD ANY EFFECT AT ALL UPON INTERSTATE COMMERCE, SUCH EFFECT WAS ACCIDENTAL, SECONDARY, REMOTE, AND NOT EVEN PROBABLE.

That a combination of three corporations, manufacturing four different, non-competing commodities in the same State, into one corporation, manufacturing all four com-

modities in the same State, has no direct or immediate effect on interstate commerce, seems obvious.

There is no case which holds that such a combination had such direct or immediate effect. If it does have such an effect, then there has never been a time since the passage of the Sherman Act in 1890 that any State corporation could be organized for the purpose of dealing in different commodities, that intended to engage in interstate commerce. The charge in this case is that these defendants formed this combination. In other words, the charge here is rather that these defendants formed a partnership to carry on the different businesses formerly carried on by the six partners, respectively, creating that of the United Shoe Machinery Company. If, however, this combination or partnership is a direct or immediate restraint upon interstate trade, then there has never been any time since the passage of the Sherman Act in which a partnership could be formed of partners each dealing in different commodities to engage in an intrastate manufacturing business which might develop into an interstate business. The proposition seems absurd, particularly in view of the language of the Supreme Court heretofore quoted in relation to the preceding point.

That in order to be bad under the Sherman Act the restraint must be direct and immediate is well settled.

In *Bigelow* v. *Calumet & Hecla Mining Company*, 167 Fed. 721, at page 725, Mr. Justice Lurton, then Circuit Judge, in rendering the opinion of the Court of Appeals, said:—

> ... "In *Hopkins* v. *United States*, 171 U. S. 578, 594, 600, 19 Sup. Ct. 40, 45, 46, 43 L. Ed. 290, Mr. Jus-

tice Peckham emphasizes this obvious limitation when, speaking for the court, he said:

> 'There must be some direct and immediate effect upon interstate commerce in order to come within the act.'

"The same discriminating justice then adds:

> 'An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation would not be direct. . . . The act must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly restrain it.'

"This limitation of the act to those contracts and combinations which directly and immediately or necessarily affect commerce among the states is recognized in a long series of opinions."

The Court further says, at page 731:—

> . . . "No express agreement is shown by which anything is to be done or left undone from which an unlawful restraint must, or will, probably happen. The case differs from all of the cases appealed to by the learned counsel for appellants in this important particular."

The Court further adds, at page 732:—

> "In *Cincinnati, P. B. S. & P. Packet Co.* v. *Bay*, 200 U. S. 179, 184, 26 Sup. Ct. 208, 209, 50 L. Ed. 428, it is cogently said, in respect to the question as to whether a particular combination or agreement will operate to produce an unlawful result under the anti-trust law, that 'a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.'"

See, also, *Anderson* v. *United States*, 171 U. S. 604, at page 615, where Mr. Justice Peckham says:—

> . . . "Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object."

In *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, at page 623 Mr. Justice Day says:—

> . . . "In this day of multiplied means of intercourse between the States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation."

That the soundness of this proposition remains undisputed is shown by the following quotation from Mr. Chief Justice White's opinion in *Standard Oil Co.* v. *United States*, 221 U. S. 1, at page 66:—

> . . . "And, referring in the *Hopkins Case* to the broad claim made as to the rule of interpretation announced in the *Freight Association Case*, it was said (p. 592):
>
> 'To treat as condemned by the act all agreements under which, as a result, the cost of con-

> ducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act.'"

WHETHER THESE LEASE PROVISIONS ARE OR ARE NOT IN RESTRAINT OF TRADE IS NOT BEFORE THIS COURT FOR SEVERAL REASONS:—

1. These defendants are not indicted for making these lease provisions.

The United States proceeds to argue this case exactly as if these defendants had been indicted for making either a lease or a system of leases containing these alleged onerous and oppressive provisions; exactly as if the allegations were that on a certain day the defendants made a certain lease with a certain person, which lease contained the provisions set out in the counts, and that the lease was in restraint of trade; with proper averments as to intentions.

There is nothing of the kind on this record.

Doubtless the Grand Jury might have indicted these defendants for making leases containing provisions which the United States regarded as in restraint of trade, and the United States could have charged such leases either as contracts in restraint of trade or that the system of leases created a combination. The Grand Jury could have drawn such indictment as it chose, but, having drawn the present indictment, the United States is by all the rules of criminal pleading confined to the present indictment, and cannot now amend it in this court.

2. The language of the indictment in regard to these leases.

The only averments in the indictment in regard to these lease provisions are as follows:—

> "And said defendants, in so as last aforesaid carrying on, with the design and intent aforesaid, the interstate business, trade and commerce so formerly independently carried on by them by groups as aforesaid have ceased to manufacture any of such shoe machinery at Boston or Lawrence aforesaid, and have manufactured all of the same at Beverly aforesaid, in said District of Massachusetts; have ceased to sell any of such shoe machinery to said shoe manufacturers; have confined themselves to leasing the same to such shoe manufacturers upon written leases containing certain onerous and oppressive provisions not found in their former leases, that is to say, provisions whereby any of said shoe manufacturers leasing any of such kinds of machines have been bound to use in their manufacturing business only machines, of some or all of the several other kinds aforesaid, furnished to them by said defendants, and were prohibited from using any machines, of any of those kinds, furnished or offered to them by other shoe-machinery manufacturers, and this upon penalty of having all machines leased to them by said defendants immediately reclaimed and taken away by said defendants and the leases thereof canceled, if they violated such prohibition; and have continually and persistently arbitrarily enforced said onerous and oppressive provisions, by all the means in their power, as against said shoe manufacturers, and made it their general policy and practice to refuse to furnish to them such shoe machinery, and to otherwise injure in every way they could, all shoe manufacturers who have failed to comply with the terms or spirit of said onerous and oppressive provisions in said leases." (Record, pp. 21, 22.)

3. The act of the defendants in relation to these lease provisions only an overt act, and only one of three or four overt acts named in the same paragraph of indictment.

The act of the defendants in confining themselves to making leases containing these lease provisions is not part of either the combination or the conspiracy alleged to be created by the organization of the United Shoe Machinery Company by the defendants together, and the turning over by the groups of defendants to, and the acceptance by that corporation of the capital stocks and business of the three original corporations, but only an overt act; [Record, p. 21, pp. 43, 44]; simply an overt act occurring after the combination or the conspiracy, and this overt act is not even charged as unlawful, but simply styled onerous and oppressive. Such overt act is not in any sense a part of the description of either the combination or the conspiracy.

4. The combination and conspiracy are each absolutely complete without this overt act.

The combination and the conspiracy are each absolutely complete without this overt act of the defendants in confining themselves to making leases containing alleged onerous and oppressive provisions, on the theory of the United States as presented by its brief.

The very first point of the brief of the United States is (p. 13): "The combination of the three groups of defendants into one group, acting under the name of the United Shoe Machinery Co., constituted a combination and conspiracy in restraint of trade in violation of the Sherman anti-trust law," and this proposition the United States has developed and argued at great length in its brief.

That such a proposition has always been the theory of the United States is shown by the claim of the United States that the combination may be unmade. This claim is made at the end of each count of the indictment (for instance, see Record, pp. 22, 23, first count), and no mention whatever is made in such claim in regard to the leases.

5. The leases not a part of the combination or conspiracy. No original intent to change leases. No agreement to change leases.

That the act of defendants in making the leases containing these provisions is not a part of the combination or conspiracy is further shown by the fact that there is not the slightest intent alleged in the original combination to change the leases. The only intent alleged in relation to the leases is the allegation (Record, p. 21):—

> "And said defendants, in so as last aforesaid carrying on, with the design and intent aforesaid, the interstate business, trade and commerce so formerly independently carried on by them by groups as aforesaid, . . . have confined themselves to leasing the same . . . upon written leases containing certain onerous and oppressive provisions not found in their former leases . . ."

This is only an allegation that the changing of the leases is one of the many numerous acts done by the defendants in the course of carrying on, with the intent with which such business was organized, a large business, nor was there any *agreement* anywhere set out on this record, either originally or later, to confine themselves to the alleged leases.

6. Leases not part of the original combination or conspiracy because between different parties.

The original combination and conspiracy is between the six original defendants alone.

The leases are between the six original defendants and a great number of shoe manufacturers: therefore, whether such leases containing such provisions be regarded as contracts in restraint of trade or as a system of leases creating a combination, it is evident that they are something different from and not included in the original combination or conspiracy.

7. The question of duplicity on the theory of the United States.

The United States has strongly argued as its first point of its brief that "the combination of the three groups of defendants into one group, acting under the name of the United Shoe Machinery Co., constituted a combination and conspiracy in restraint of trade in violation of the Sherman antitrust law." (p. 13.)

Now these leases are claimed to be either:—

(1) Contracts in restraint of trade, or

(2) The system of leases creates a combination in restraint of trade.

If, therefore, the lease provisions are anything more than an original overt act, then it is obvious that, on the theory of the United States, the United States has presented in each count of each indictment more than one offence under the Sherman Act.

In the first count there is the original organization of the United Shoe Machinery Company insisted upon by the government as a combination.

In addition to this there is either the contract or combination created by the lease provisions.

This count, on this theory, is clearly bad for duplicity.

In other words, the United States with reference to these leases has taken a single, isolated overt act in each count, and created it into a criminal offence. If these lease provisions are before the court, it must be because they are sufficiently set out in the indictment. If so, then the two counts are clearly bad for duplicity.

The United States also incidentally mentions a "general scheme of combination," etc., at pages 34 and 50 of its brief, and calls the leases "an additional step."

Such argument on the part of the United States can lead to but one proposition, that each count of the indictment is bad for duplicity, and that is the decision, right or wrong (and the question of the correctness or error thereof, is not before this Court), made by the district court from a similar argument in the district court.

8. The lease provisions in these two counts were not construed or passed upon by the District Court.

The district court did not construe the Sherman Act with reference to these lease provisions in this indictment. The district court did say, referring undoubtedly to these lease provisions (the argument having been made by the defendants that the leases containing these lease provisions should be set out in full). (Demurrer item 15, Record, pp. 51, 52. Demurrer item 13, Record, p. 59):—

> "It is not ordinarily necessary to set out an instrument by its tenor unless it becomes directly the subject-matter of the litigation." (Record, p. 76.)

Such statement is simply a statement as to general law, has nothing to do with the Sherman Act, and the district court holds that these leases are not directly the subject-matter of the litigation.

At this point we desire to call attention to the fact that there is some language in the opinion relating to leases (Record, pp. 93, 94), but this language relates entirely to the leases referred to in the other indictment not before this court, and the allegations in regard to the leases in the other indictment are entirely different from the allegations in the present indictment, as shown by the statement of the district court. (Record, p. 93.)

9. If the lease provisions had been involved here, the District Court would have considered the patent law.

If the leases had been involved in this case, the district court would unquestionably have considered the patent question on this indictment, but the court squarely refused to consider the patent question on this indictment. (Record, p. 94.) On the other indictment, 114, the patent question was not mentioned on the record, and so the court could not consider it on that indictment.

10. These defendants respectfully insist, therefore, that the question of the lease provisions is not before this Court on this record.

53

REPLY TO BRIEF OF THE UNITED STATES.

PRELIMINARY STATEMENT.

These defendants regret as much as the United States possibly can the fact that proper issues have not been raised in proper proceedings to determine all questions which might be properly set out in relation to the organization of the United Shoe Machinery Company and the subsequent methods of doing business of that Company.

These defendants regret that the facts of the case have not been established, either in the trial of a civil proceeding, where all the actual facts of the case could be definitely established, or even in a criminal proceeding, where possibly only limited facts might be produced; but, nevertheless, these defendants are bound by the record in this case, and it is not the fault of these defendants that the record is so narrow, so limited, so vague, and presents so many purely moot questions.

These defendants insist absolutely that this case was decided by the district court on two grounds, one a question of pleading, the other that the organization of the United Shoe Machinery Company was neither a combination nor a conspiracy in restraint of trade under the Sherman Act; that the only question, therefore, before this court, under the Criminal Appeals Act, is as to whether that construction of the district court was right or wrong, and that that question has become a moot question by the decision in the district court on the question of duplicity, and that neither the patent question, so called, nor the lease question is before this court on this record.

These defendants regret that any consideration of the so-called onerous and oppressive provisions of the leases by this court must be purely incidental and moot, for the reason that neither the exact language of all of the leases nor the exact language of any single lease is set out in this case by the United States, and does not purport to be so set out.

THE ENTIRE ARGUMENT OF THE UNITED STATES IN REGARD TO THE BUSINESS OF THESE DEFENDANTS AND OF THE UNITED SHOE MACHINERY COMPANY IS BASED ON THE ERRONEOUS VIEW THAT THE MACHINES OF THE DEFENDANTS WERE ALL THE MACHINES USED IN SHOE MAKING.

There is absolutely not one word upon the record to sustain such view.

The defendants control only patented types of four different general classes of machines. (Record, p. 17.) Three of these types are used in fastening the soles and heels to shoes, and one type only—the lasting machine—to prepare the uppers for such fastening to the soles and heels.

It is a matter of common knowledge that there are a great many other machines used in shoe making outside of even these four general classes of machines.

AS A COROLLARY TO THE ABOVE, THE UNITED STATES SAYS THAT "THESE DEFENDANTS CONTROL BETWEEN SEVENTY AND EIGHTY PER CENT. OF THE ENTIRE SHOE MACHINERY BUSINESS IN THE UNITED STATES."

This second error of the United States is founded upon its previous error. There is absolutely nothing in the

record to substantiate the proposition. The allegations in the indictment are that each group of defendants in each instance manufactured a certain percentage (of the class of machines manufactured by such group) manufactured in the United States. A single allegation will serve as illustration. Defendant Storrow, who manufactured two classes of machines out of the entire four classes, "manufactured the larger portion, to wit, seventy per cent., of all such heeling machines, and the larger portion, to wit, eighty per cent., of all such metallic fastening machines, manufactured in the United States; . . ." (Record, p. 17.) The allegations in regard to the other groups are substantially similar.

This error of the United States in confusing the machines of the defendants with all the machines used in the manufacture of shoes, and the additional error that the defendants controlled certain percentages of the entire shoe machinery business in the United States, permeates the entire argument of the United States, and is constantly referred to by the United States, the language varying from time to time, however.

One or Both of these Errors occurs in the Following Places in the Brief of the United States,—pages 4, 5, 17, 22, 23, 25, 26, 30, 31, 32, 33, 34, 41, 42, and on the cover of the brief of the United States.

The proposition is correctly stated at pages 15 and 16.

On this record the particular form of the organization of the United Shoe Machinery Company, and the taking over of the capital stocks and business of the three original corporations is immaterial.

It is immaterial whether the United Shoe Machinery Company was the actual owner, custodian, trustee, or

equitable owner of the capital stocks and business of the three corporations. The question is whether three groups, one owning two different commodities, and each of the others owning one different commodity, have a *right* to combine those four different commodities, and not as to the *form* of the combination.

These defendants claim that the organization of the United Shoe Machinery Company was legal and normal, and that the district court did not err in so holding; but the particular form of the organization, whether it be a corporation, a partnership, or a holding company, is absolutely immaterial.

Why indictment 113 was "curtly dismissed" by the district court.

It was dismissed for duplicity.

On page 10 of its brief the United States says the district court held that the acts charged did not constitute a violation of the Sherman Law, *apparently* upon the ground that the formation of the United Shoe Machinery Company was purely an economic arrangement, etc., and in a footnote the United States adds: "We say 'apparently' because the opinion below deals with indictment No. 114, and yet curtly dismisses indictment No. 113 'for the same reason.'" The word "apparently" as used by the United States on this page of the brief and in its footnote is very interesting and enlightening, inasmuch as the defendants have already shown in the body of their brief that the district court actually held the two counts of indictment 113 invalid and bad on a pure question of general law, that is, duplicity in pleading, which explains why indictment 113 was "curtly" dismissed by the district court.

Why was the second count of indictment 114 not brought to this court by the United States?

The two counts of indictment 113 now before this court were dismissed "*for the same reason* which invalidates the second count of indictment 114." (Record, p. 94.) There was absolutely the same legal reason for the United States to bring up this second count of indictment 114 as for bringing up the two counts of indictment 113.

Can it be that the second count of indictment 114, though very short, disclosed too plainly the presence of duplicity?

The defendants are not indicted for dominating the supply of shoe machinery.

At page 17 of its brief the United States says, referring to the situation before February 7, 1899:—

> . . . "The situation was one which invited concerted action and made exceedingly easy the accomplishment of any purpose to dominate the supply of shoe machinery; and if, by concert of action, the sources of what little existing competition there was be removed, the defendants acting together would have a complete monopoly."

This proposition is taken from the *Reading Case*, 226 U. S.—

But the situation there was very different. There the parties were engaged in competition in the same commodities: (*a*) interstate transportation; (*b*) trading in coal.

In our case the defendants were not engaged in the shoe machinery business generally. They only manufactured (*a*) four distinct and separate kinds of shoe machinery

(different commodities). (*b*) They only manufactured such of four distinct and separate kinds as were covered by the defendants' patents.

The argument of the United States fails absolutely, because the defendants are not indicted for dominating the supply of shoe machinery.

They are not indicted for *monopolizing* anything.

They are indicted (1) for restraining their own trade in the four distinct and different kinds of shoe machinery (different commodities); (2) for restraining the trade of the shoe manufacturers in shoe machinery. This second count relates of course *only* to the four different kinds of shoe machinery which the defendants had, for they had nothing to do with any other kinds. This argument as to *domination* of the trade occurs also at pp. 23, 26, 31, and 41 of the brief. At page 23 it is to be noticed that in the *Union Pacific Case*, there cited, "natural and existing competition was suppressed" by the "dominating control in one corporation," while in the present case there is no competition between the defendants, and the position of the Independents is not changed by the organization of the United Shoe Machinery Company.

The alleged competition before February 7, 1899 (the date of the organization of the United Shoe Machinery Company), and the alleged competition after February 7, 1899.

At page 16 of its brief the United States says, "The competition existing before February 7, 1899, may be thus summarized:" and its table shows the amount of trade controlled by the three original corporations, respectively, as contrasted with the amount of trade controlled

by the *Independents*. Why the United States uses the words "competition" and "competitors" we do not know, except on the assumption that every person manufacturing, for instance, a lasting machine under letters-patent, is a competitor of every other person manufacturing another lasting machine, patented or unpatented.

While the machines of the defendants are all patented, it is evident that on February 7, 1899 there must have been a good many unpatented machines of each of the four classes of shoe machinery referred to in the indictment open to the public, for the indictment states (Record, p. 1) that for twenty-five years practically all of the shoes worn by the people of the United States had been manufactured by the aid and use of several different kinds of machines. Now a patent only runs seventeen years, so, even if these machines had all originally been patented, the patents must have expired, and the patents on many machines thrown open to the public.

Again, at page 19 of its brief the United States sets out another table showing the amount of trade controlled *after February 7, 1899*, by the *United Shoe Machinery Company* as contrasted with the amount of trade controlled by the *Independents*.

But these tables are absolutely identical with a change of name only, the name of the United Shoe Machinery Company being substituted for the three original corporations, and the United Shoe Machinery Company is represented as controlling seventy per cent. of the lasting machines instead of the Consolidated sixty per cent. and the Goodyear ten per cent.

The United States says that instantly the variety of choice of the theoretical shoe manufacturer was reduced from 24 to 16. We presume this reduction comes from the two classes of lasting machines being put into the

hands of the United Company, and thereafter called by the United States one lasting machine, but merely calling the two lasting machines one lasting machine does not make them such. The two lasting machines were just as distinct and different after the consolidation as before, and were put out after just as they were before the consolidation, so that as a matter of fact the variety of choice was not reduced from 24 to 16, but stayed absolutely at 24. In other words, the two tables before and after February 7, 1899, are exactly identical, which is just what these defendants claim in this respect, namely, that the organization of the United Shoe Machinery Company had no effect whatever upon the situation existing February 7, 1899, and by the United States' own tables the percentage of business controlled by the Independents is exactly the same after as before February 7, 1899, and there was just as much competition possible after February 7, 1899 as before that date.

The business of the Independents was not interfered with at all by the organization of the United Shoe Machinery Company. They had exactly the same percentage after February 7, 1899 as before.

At page 26 of its brief the United States says the organization left "but a fragmentary competition in the hands of the scattered Independents in the four different lines." But they had all that they ever had—the same percentage of each different line—after the organization as before.

Even if the business of the Independents had been interfered with, these defendants are not indicted for restraining the trade of the Independents, but for restraining (*a*) their own trade; (*b*) the trade of the shoe manufacturers in shoe machinery.

THE ARGUMENT OF THE UNITED STATES, AT PAGES 23-34, AS TO THE EFFECT OF THE ORGANIZATION OF THE UNITED SHOE MACHINERY COMPANY, IS ABSOLUTELY FALLACIOUS.

The proposition of the United States is (Brief, p. 23):

> "The combination of from 70 per cent. to 80 per cent. of all the shoe-machinery business of this country into one hand is in itself so great a proportion of the entire business as to constitute a restraint of trade within the meaning of the Sherman antitrust law."

Before considering the argument, we must point out and reject the numerous misstatements and errors of FACT *contained therein.*

(1) The combination here is not "*of all the shoe-machinery business of this country,*" but only of four different distinct kinds of patented machines.

(2) We have nothing to do with the "shoe-machinery business as a whole," mentioned at page 25.

(3) Shoes "have to be made by three or four kinds of machinery," page 25. They are made by a great many kinds of machinery.

(4) No one group could "dominate the shoe manufacturing business," page 26. Defendants not indicted for that.

(5) "*It now put from 70 per cent. to 80 per cent. of all the shoe-machinery business into one control,*" page 26. Nothing of the kind. Defendants did not manufacture shoe machinery, but only four distinct separate kinds and patented at that.

(6) Controlling "*all the shoe-machinery business,*" page 26. Nothing of the kind.

(7) Such a disagreement meant a disagreement with the controlling manufacturer of every class of machine

used in the shoe business (p. 30). *This proposition is absolutely erroneous.* The defendants only dealt with four classes of machines and only with patented types of each such class. There are *many* classes of machines used in the shoe business.

(8) At page 30 the United States refers to a combination of four groups instead of three.

(9) At page 31 the United States goes off the record to attack what it calls the "original consolidation" into one group of any one class. It does not appear on this record that there ever was any such "original consolidation."

(10) At page 31 the United States refers to a combination of four groups instead of three.

(11) At page 31 the United States makes possibly the most careless statement of all in referring, probably, to the organization of the United Shoe Machinery Company as "a combination into one group of about 75 per cent. of the whole business of the country."

(12) At pages 32 and 33 the language used is about "80 per cent. of a great trade" and "80 per cent. of the total trade."

The defendants only manufacture four different kinds of machines, and only patented machines of each type. Under their patents they are entitled to one hundred per cent. of the type of machine they manufacture.

THE ARGUMENT OF THE UNITED STATES FALLACIOUS.

The argument of the United States seems to rest upon the proposition that the *organization of the United Shoe Machinery Company* restrained the choice of the shoe manufacturer in the four classes of machines of which the defendants manufactured particular patented types.

The United States says, at page 23, "Originally [*i.e.*, before the organization] a shoe manufacturer could get *all or none* of his machines from the various groups of defendants, or one or more from some of them, and the balance from other manufacturers (which others we will call Independents)." (Italics ours.)

But the *organization* of the United Shoe Machinery Company had absolutely no effect upon this situation.

A shoe manufacturer could still get "*all or none*" of his machines from the various groups.

A shoe manufacturer could still get "one or more" from the United Shoe Machinery Company, and the balance from the Independents, so far as the organization is concerned.

The United States says, at page 25: "Each kind of machine was but one out of four essential processes, and the *Independents could as to any particular machine furnish fair competition.*" (Italics ours.)

If we accept this statement of the United States as true, we have the following results:

That is to say:—

The Independents could, as to Lasting Machines, furnish fair competition.

The Independents could, as to Heeling Machines, furnish fair competition.

The Independents could, as to Metallic Fastening Machines, furnish fair competition.

The Independents could, as to Welt Sewing and Outsole Stitching Machines, furnish fair competition.

But the *organization of the United Shoe Machinery Company* had absolutely no effect upon the Independents. It did not take anything away from the Independents. The Independents had the same percentage of business after the organization of the United Shoe Machinery Company as before.

See the two tables (Brief of the United States, pp. 16, 19) showing, respectively, the positions of the United Shoe Machinery Company and the Independents before and after the organization of the United Shoe Machinery Company.

On the very argument of the United States the Independents could furnish fair competition "*as to any particular machine*" after the organization of the United Shoe Machinery Company as well as before.

So that the choice of the shoe manufacturer was not restrained by the *organization* of the United Shoe Machinery Company, and the organization of the United Shoe Machinery Company is not in restraint of trade.

The particular patented machines of these defendants are not indispensable to the manufacturer of shoes by the admission of the United States in its brief.

This proposition follows from the quotations from the brief of the United States made from pages 23 and 25, cited in the above argument, and from the argument, page 24, in substance that the shoe manufacturer could

get "all or none" of these machines from these defendants and that the "Independents could as to any particular machine furnish fair competition."

If the particular patented machines are not indispensable but merely desirable, the argument of the United States from the *St. Louis Terminal Case* is absolutely immaterial, because there is now and always has been at least two and probably many more routes into the St. Louis of shoe manufacturing, either via the numerous lines of the Independents or via the short line of the United Shoe Machinery Company.

The dissatisfied shoe manufacturer mentioned by the United States is better off after the organization of the United Shoe Machinery Company than before.

At pages 24, 26, and 30 of its brief the United States argues that the shoe manufacturer who, for any reason, became dissatisfied with one group could leave that group and go to the Independents, but could still get machines from the other groups, but that after the organization a disagreement with one group is a disagreement with all three.

Before the organization, defendant Storrow—one man—manufactured two kinds of patented shoe machinery, out of four kinds referred to in this case. (Although he manufactured two kinds of patented shoe machinery, out of the four kinds represented in this case, the United States *nolle prossed* the case against him (Record, p: 70)). If the shoe manufacturer quarrelled with this one defendant he could get *neither the heeling machines nor the metallic fastening machines* of this defendant. After the organization, the combination on the theory of the United States, consisting of six defendants, the

shoe manufacturer would have to quarrel with two out of the six defendants to lose his machines, for the vote of the six defendants to deprive the shoe manufacturer of machines must stand 4–2. In other words, the chances of the dissatisfied shoe manufacturer have increased one hundred per cent.

The same argument applies to the Goodyear group. If the shoe manufacturer quarrelled with two members of the Goodyear group before the organization, he could not get the Goodyear machines, but after the organization, if he quarrelled with the Goodyear group, the vote of the six defendants as to his getting the machines would be four to two, and he would get the Goodyear Machines.

As to the McKay group, before the organization, if the shoe manufacturer quarrelled with two out of the three persons, he lost his machines; after the organization, he must quarrel with three persons to lose them.

But neither the argument of the United States in this respect, nor our argument is of much importance. Modern business does not mind disagreements between individuals. Almost every business man to-day does business with persons with whom he does not agree. In any event of disagreement the dissatisfied shoe manufacturer could get all of his machines of the Independents. Brief of the United States, pages 23, 25.

The organization of the United Shoe Machinery Company did not compel the customer to deal with the same group as to the four classes of machinery.

At page 30 of its brief, the United States argues that the organization of the United Shoe Machinery Company compelled the customers to deal with one and the same group instead of with four (should be three) separate groups.

Nothing of the kind. *The customer could get all of his machines of the Independents.* Brief of the United States, pages 23, 25.

The particular machines of the United Shoe Machinery Company are not indispensable. Brief of the United States, pages 23, 25.

It is interesting and illuminating to notice right here that before the organization on this theory of the United States the customer was "compelled" to deal with one defendant Storrow if he wanted either or both of two out of four kinds of the patented shoe machinery under discussion in this case.

The theory of the United States applies, however, to every patented machine. If the customer wants a particular patented machine he must deal with the owner of the patent.

All of the cases cited by the United States in this section of its brief relate to combinations of competitors dealing in the same commodity, and the language used by the court in the lengthy quotations made by the United States from the *St. Louis Terminal Case*, the *Union Pacific Case*, and the *Reading Case* must be considered in connection with the particular facts of each such case.

The quotations in question have absolutely no relevance to the case at bar where the defendants were never competitors and each group dealt with a different commodity.

THESE DEFENDANTS CLAIM THAT THE ENTIRE CASE OF THE UNITED STATES, SO FAR AS THE ORGANIZATION OF THE UNITED SHOE MACHINERY COMPANY IS CONCERNED, FAILS AT ONCE WITH THE HONEST AND FRANK ADMISSION OF THE UNITED STATES, MADE IN REGARD TO THE OPINION OF JUDGE PUTNAM.

The United States seems to recognize the fallacious character of its argument that the combination of four different kinds of patented machines, constituting different commodities, is a combination or conspiracy in restraint of trade, for it says, at pages 32 and 33 of its brief:—

> "In order that there may be no possible room for misapprehension of the Government's position on this point, we freely concede that it would be entirely proper and, in the language of Judge Putnam (Rec. 91–92), 'in strict and normal compliance with modern trade progress' to form a 'combination of various elements of machinery, all relating to the same art and the same school of manufactures, for the purpose of constructing economically and systematically, and of furnishing any customer, the whole or any part of an entire system,' in order 'for any dealer to supply mere details or an entire system of machinery, according as his customers may desire,' *provided the combination was of only a reasonable proportion of the total trade;* and if a corporation (formed by the consolidation of several companies each owning a different class of machinery) made every class of machinery (but its total control was only (say) 25 per cent. of the total trade) it would doubtless be a normal trade development. But without attempting now to determine exactly at what percentage of trade control a corporation passes into the region of illegal restraint, certainly when the combination acquires 80 per cent. of the total trade the line between legal and illegal combinations has been passed."

Inasmuch as the United States all the way through its brief, and in the above statement even, has made the absolutely unwarranted assumption that the United Shoe Machinery Company, or these defendants, was engaged in the entire trade in shoe machinery in the United States, and had a total of seventy or eighty per cent. of the entire trade in shoe machinery, and inasmuch as the condition and undoubted fact is that the United Shoe Machinery Company only deals in four classes of shoe machinery out of many different classes of machines used in the manufacture of shoes, and only manufactures a patented form of each such class, it may well be that the entire trade of the United Shoe Machinery Company in these classes constitutes less than ten per cent. of the entire trade in shoe machinery of the United States, and therefore (inasmuch as the United States assumes that twenty-five per cent. of the total trade would be a normal trade development) that these defendants come absolutely far within the saving clauses and the saving views of the United States, as set forth in the above quotation from its brief, pages 32 and 33.

But it is to be noticed that Judge Putnam makes no distinction of degrees—he makes no distinction of percentages. It is to be further noted that there is no law upon the subject in any of the cases except in so far as a percentage of trade might be held to create a monopoly.

IT IS TO BE REMEMBERED (a) THAT THESE DEFENDANTS ARE NOT INDICTED FOR MONOPOLIZING; (b) THE DEFENDANTS' MACHINES ARE PATENTED AND THE DEFENDANTS ENTITLED TO ONE HUNDRED PER CENT. OF THE TRADE THEREIN.

It is to be remembered that all of the machines of these defendants, or of the United Shoe Machinery Company,

are patented; that these defendants, or the United Shoe Machinery Company, have a monopoly of each of its specific machines, and a lawful monopoly therein, and are entitled not to twenty-five per cent. of the trade therein, but are entitled to one hundred per cent. of the trade therein, *even if there never was any other shoe machine made in the United States except such as was made under Letters Patent of these defendants or of the United Shoe Machinery Company.*

Therefore, on the Government's own showing and admission, the organization of the United Shoe Machinery Company is perfectly legal and proper, and not in restraint of trade.

CONCLUSION.

The judgment of the District Court should be affirmed.

WILLIAM A. SARGENT,
Of Counsel for Defendants.

HURLBURT, JONES & CABOT,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1912

No. 630.

THE UNITED STATES,

Plaintiff in Error

v.

SIDNEY W. WINSLOW, EDWARD P. HURD, GEORGE W. BROWN, WILLIAM BARBOUR, ELMER P. HOWE,

Defendants in Error

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR DEFENDANTS IN ERROR

FREDERICK P. FISH
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BOSTON
PRESS OF GEO. H. ELLIS CO.
1913

SUBJECT INDEX.

PAGE

Preliminary Statement of Case 1–7

(*a*) Only Counts 1 and 2 are before the Court 2

(*b*) Summary of facts alleged 2–5

(1) The facts alleged show (*a*) the merger by the defendants of three non-competing companies into the United Shoe Machinery Company; (*b*) the insertion by said Company (which was managed by the defendants), in its leases, of certain alleged oppressive provisions not found in the previous leases 2–5

(*c*) Summary of question before the court.
The only question is whether the merger of the three non-competing companies was lawful . . 5–7

Questions before this Court. The jurisdiction of the Court under this Writ of Error 7–14

(*a*) This Court is limited to a consideration of the particular construction of the Sherman Act on which the District Court's decision was based 7–10

U. S. v. *Bitty*, 208 U. S. 393.
U. S. v. *Keitel*, 211 U. S. 370.
U. S. v. *Mason*, 213 U. S. 115.
U. S. v. *Mescall*, 215 U. S. 26.
U. S. v. *Stevenson*, 215 U. S. 190.
U. S. v. *Kissel*, 218 U. S. 601.
U. S. v. *Barber*, 219 U. S. 72.
U. S. v. *Miller*, 223 U. S. 599.

PAGE

(b) This Court must accept the District Court's construction of the indictment and is limited to the question of the application of the Sherman Act to the indictment as so construed 11–13

U. S. v. *Biggs*, 211 U. S. 507.

U. S. v. *Miller*, 223 U. S. 599.

(c) Only such questions as to the construction of the Sherman Act are presented to this Court as it is affirmatively shown form the basis of the District Court's decision 13–14

Citation of authorities on this point.

The District Court sustained the demurrers on two grounds, (1) because two distinct combinations or conspiracies were charged in each count, which made the counts invalid for duplicity, and (2) because if a single combination or conspiracy could be said to be charged in each count it consisted solely of the merger of the three companies, which merger was not made unlawful by the Sherman Act . . . 14–17

The District Court's decision that the counts were bad for duplicity and that if it could be held that they only charged one combination or conspiracy, it consisted solely of the merger of the three companies, involved merely a construction of the indictment and not a construction of the Sherman Act, and must, therefore, be accepted by this Court 18–22

Furthermore, this decision was correct both

(a) As to duplicity; and 19–20

(b) As to its holding that if a single offence was charged it consisted solely of the merger of the three companies 20–22

The only construction of the Sherman Act involved in the District Court's decision, and, therefore, the only question presented to this Court, is whether the merger of the three companies was lawful under the Sherman Act 22–23

PAGE

Rules applicable to interpretation of an indictment 23–25

(a) No material fact can be supplied by implication or intendment 23–25
Citation of authorities on this point.

Effect of allegations of intent 25–29

(a) They cannot supplement insufficient allegations of fact 25–26
Commonwealth v. *Hunt*, 4 Met. 111.
Pettibone v. *U. S.*, 148 U. S. 197.
Commonwealth v. *Peaslee*, 177 Mass. 267.

(b) Allegations of intent must be distinguished from allegations charging the crime 26

(c) In cases under the Sherman Act general allegations of intent to restrain trade or monopolize cannot by themselves import any illegality 26–27

(d) Character of allegations of intent in the present case 27–28
Citation of authorities on these points.

Facts alleged in the indictment 30–34

(a) First Count 30–34
(b) Second Count 34

Important facts included in and important facts omitted from the indictment 35–45

(a) The best machines have been manufactured under patents 35

(b) The defendants' machines were manufactured exclusively under patents 35–36

(c) The defendants did not manufacture all types of shoe machinery 36

(d) The defendants, prior to the merger, were not in competition with each other 37–39

PAGE

(*e*) The defendants manufactured only in Massachusetts, 39

(*f*) It is not alleged that the defendants had the larger portion, or any considerable portion, of the interstate trade in shoe machinery 39

(*g*) It is not alleged that the defendants had any beneficial interest in the United Shoe Machinery Company 39–40

(*h*) There was no agreement by defendants to restrain their individual conduct 40

(*i*) There was no agreement to fix prices, limit production, or restrict others 40

(*j*) The leases are not charged as part of the combination or conspiracy 40–41

(*k*) No limitation of the amount of production is charged, 41

(*l*) It does not appear to what extent defendants sold machines (as distinguished from leasing them) prior to the merger 41

(*m*) The provisions in the leases did not require a use of all the defendants' machines, if one or more were used, but merely required a shoe manufacturer leasing one or more machines to use some (that is, one, or at most two) others 41–44

(*n*) The provisions in the leases did not require the use of machines for any specified period of time; the lessee was free to stop using them at any time . . 44

(*o*) The defendants' machines were adapted for use together 44

(*p*) A lease of patented machines constitutes a license to use 44

(*q*) Presumably defendants obtained a royalty fixed by the extent of the use of their machines 44–45

(*r*) It is not alleged that the defendants employed any unfair practices 45

PAGE

The merger of the three companies was lawful and proper 45–73

(*a*) The leases form no part of the merger and are not pertinent to this discussion 46

(*b*) No express agreement to restrain trade is alleged, and, therefore, the Government is compelled to contend that the natural, necessary and inevitable effect of the merger was to restrain trade. 46

(*c*) In every prior case, except *Lowe* v. *Lawlor*, 208 U. S. 274, the combination complained of has been a combination of competitors or a combination formed to eliminate competition 46–47

(*d*) Character of conduct condemned by the Sherman Act 47–48

Standard Oil Co. v. *U. S.*, 221 U. S. 1.
U. S. v. *American Tobacco Co.*, 221 U. S. 106.
U. S. v. *Joint Traffic Asso.*, 171 U. S. 505.
Anderson v. *U. S.*, 171 U. S. 604.

(*e*) Advantages and economies of the merger 49–51

(*f*) Examples of other combinations for similar normal purposes 51–52

(*g*) The merger did not produce, was not designed to produce, and its natural or necessary effect was not to produce any restraint of trade, for

(1) The defendants were not personally restrained; 53
(2) The defendants' business was not restrained; 53–54
(3) The shoe manufacturers were not restrained; 54
(4) Other shoe machinery manufacturers were not restrained 54

(*h*) The Government's contention that the shoe manufacturers' liberty of action was restrained because the number of concerns with which he could disagree was reduced, is unsound 55–56

(1) If disagreement means disagreement as to price or quality of a machine, the shoe manufacturer would be no worse off after the merger than he was before 55–56

PAGE

(2) If disagreement means a quarrel and refusal to do any business, it cannot be seriously contended that because of the possibility of such disagreements the merger might restrain trade; they would be unlikely and not a natural result of the merger 56

(i) The charts contained in the Government's brief show no restraint and furthermore are misleading . . 56–57

(j) The size of the three businesses which were combined does not make the combination unlawful . . . 57–58

(1) Furthermore it does not appear that the defendants had a large percentage of the interstate business or manufactured all kinds of shoe machinery 58

(k) The normal development and character of businesses based on patents require special consideration in determining whether the Sherman Act is applicable to a combination of such businesses 58–65

(1) It is the essence of a business based on patents that it should be a monopoly, and if the patents cover valuable inventions the business is inevitably large 58–63

(2) The three concerns could not make each other's machines unless they combined 61–64

(3) Bearing of character of the business on general allegations of intent 64–65

(l) No greater power to restrain trade resulted from the merger, and if it could be held that any such power did result, it would not naturally or inevitably restrain trade 66–69

(1) No such power did result 66–67

(2) If it did, the probability that it would produce a restraint of trade is too remote 67

Swift & Company v. *U. S.*, 196 U. S. 375.

Commonwealth v. *Peaslee*, 177 Mass. 267.

PAGE

(3) Consideration of certain cases cited by the Government, viz.:

U. S. v. *St. Louis Terminal*, 224 U. S. 383 . 67–68

U. S. v. *Union Pacific R. R. Co.*, 226 U. S. 61 . 68

U. S. v. *Reading Co.* (decided Dec. 16, 1912) 68–69

(*m*) If any restraint of trade could result from the merger it would be purely incidental to the accomplishment of a lawful purpose 69–73

Bigelow v. *Calumet & Hecla Min'g Co.*, 167 Fed. 721.

Anderson v. *U. S.*, 171 U. S. 604.

Field v. *Barber Asphalt Paving Company*, 194 U. S. 618.

Standard Oil Co. v. *U. S.*, 221 U. S. 1.

U. S. v. *Joint Traffic Asso.*, 171 U. S. 505.

The concentration of manufacturing at Beverly produced no restraint of trade 73–74

The leases made by the defendants were clearly lawful whether considered separately or in connection with the merger 74–118

(*a*) Defendants again insist that no question as to the lawfulness of the leases is before this Court. . . . 74

(*b*) Nature of restrictions contained in the leases . . . 75–76

(1) They did not require a shoe manufacturer leasing one or more kinds of machines to use the defendants' machines exclusively (if this is material), but only required a shoe manufacturer leasing one or more machines to use one or at most two other kinds, 75

(2) Shoe manufacturers were free at any time to give up use of defendants' machines 75

(3) The defendants merely restricted the use of machines which they owned 75–76

(4) The leases amounted to licenses and the restrictions must be considered as license restrictions imposed by patentees 76

PAGE

(*c*) The general rule is that all restrictions imposed by patentees not in their very nature illegal are lawful, 76–77
Bement v. *National Harrow Co.*, 186 U. S. 70.

(*d*) Considerations of public policy not recognized in the patent law are irrelevant 77–80

(1) The right to grant restricted licenses is given by the patent law 77–78
Henry v. *Dick Co.*, 224 U. S. 1.

(2) This right, like other rights under the patent law, should be construed liberally 78–79
Ames v. *Howard*, 1 Sumner, 482.
Henry v. *Dick Co.*, 224 U. S.

(3) If general considerations of public policy can be considered as relevant, the right to impose such restrictions should be favored . 79–80

(*e*) Restrictions which merely require licensees to use patented articles in a manner in which the patentee himself might lawfully use them are not in their very nature illegal 81–82

(1) Examples of other classes of restrictions which are in their very nature illegal 81

(*f*) The Sherman Act is not applicable to restrictions which are reasonable when considered with due regard for the patentee's lawful monopoly . . . 82–83
Bement v. *National Harrow Co.*, 186 U. S. 70.
Henry v. *Dick Co.*, 224 U. S.
Standard Sanitary Co. v. *U. S.*, 226 U. S. 20.

(*g*) Reasons why the Sherman Act does not apply to restrictions which merely require the licensee to use in a manner which it would be lawful for the patentee himself to use, or which are a mere exercise of the patentee's rights 83–87

(1) As the patentee can restrain all trade, he does not create any new restraint by granting a right to use even if it is a restricted right . 83–84

PAGE

(2) The public have no right to have an unrestrained trade in or use of patented articles, 84–86
U. S. v. *American Bell Tel. Co.*, 167 U. S. 224.
Park v. *Hartmann*, 153 Fed. 24.
Rubber Tire Wheel Co. v. *Milwaukee Rubber Works Company*, 154 Fed. 358.
Cilley v. *United Shoe Machinery Co.*, 152 Fed. 726.

(*h*) If trade is affected by reason of such conditions or restrictions imposed by patentees, such effect is incidental to the exercise of lawful rights, and therefore is itself lawful 87–90
Heaton-Peninsular Button-Fastener Co. v. *Eureka Specialty Co.*, 77 Fed. 288.
Henry v. *Dick Co.*, 221 U. S. 1.

(*i*) The patentee's compensation need not be direct but may come from the sale or use of some other article, 90–91
Heaton-Peninsular Button-Fastener Co. v. *Eureka Specialty Co.*, 77 Fed. 288.
Henry v. *Dick Co.*, 221 U. S. 1.

(*j*) Restrictions in licenses under patents which are adapted to the purpose of protecting the patentee in the enjoyment of his patent, which are adopted by the patentee for this purpose and accepted by the licensee for the purpose of enabling him to enjoy the benefits of the patent, and which merely limit the right of use, are reasonable, and not condemned by the Sherman Act 91–93

(*k*) The restrictions in the present leases are of this character and are therefore reasonable and lawful . 93–97

(1) Shoe manufacturers have no object in view in accepting them except to obtain the use of defendants' patented machines 94–95

(2) Defendants have no object in view in imposing them except to obtain the best return for their patents 95

(3) Objects sought to be obtained by the restrictions 95–96

PAGE

(*l*) If any restraint resulted from these restrictions it was incidental to the lawful exercise of the defendants' patent rights 97–99

(*m*) Consideration of certain cases.

(1) *Bement* v. *National Harrow Co.*, 186 U. S. 70, 99–100

(2) *Henry* v. *Dick Co.*, 224 U. S. 1 100

(3) *Standard Sanitary Co.* v. *U. S.*, 226 U. S. 20, 101–103

(*n*) Government's contention as to rule in *Henry* v. *Dick Co.*, is not justified 104–106

(1) The rule is not limited to articles used in direct physical connection with patented articles, 104–105

(2) In the present case the different machines are adapted for use together 105–106

(*o*) The leases would have been lawful if the machines had not been patented 106–111

(1) They would constitute a lawful method of marketing the machines 106–107

(2) Example of lease of other articles used in connection with each other 107–108

(3) It is to be remembered that the defendants only restricted the use of machines which they owned and did not sell 108

(4) *United Shoe Machinery Co.* v. *Brunet*, 1909 A. C. 330 108–111

(*p*) The leases being a lawful exercise of patent rights, the merger of the three companies did not affect their legality. Owners of patents covering non-competing but related articles may combine to make a joint use of their patents and to grant licenses thereunder containing lawful restrictions, 111–114

(*q*) The Government's contention that if the leases in and by themselves were lawful, they became unlawful because part of a general scheme or plan is not sound 114–116

(1) The plan or end sought in the present case was the lawful exercise of patent rights 115

PAGE

(2) License restrictions like the present are unlike contracts relating to unpatented articles as the rules of public policy applicable to the latter are not applicable to the former . 115–116

(r) These restrictions are sustained by numerous decisions in reliance upon which the defendants have developed their business 116–118

(1) Citation of authorities on this point . . 116–117

(2) The rules laid down in these decisions are like a rule of property. 117–118
Henry v. *Dick Co.*, 224 U. S.

The Government's brief 118–120

The Criminal Appeals Act of 1907, under which the present writ of error was brought, was repealed by the Judicial Code which became effective January 1, 1912, and for this reason this Court has no jurisdiction under the present writ of error which was filed March, 1912 120–127

INDEX OF CASES.

PAGE

Aeolian Co. v. *Juelg Co.*, 155 Fed. 119 116
Ames v. *Howard*, 1 Sumner, 482 78
Anderson v. *United States*, 171 U. S. 604 . . . . 48, 71
Bement v. *National Harrow Co.*, 186 U. S. 70,
81, 82, 91, 99–100, 116
Bigelow v. *Calumet & Hecla Mining Co.*, 167 Fed. 721 . . 69–71
Bonsack Co. v. *Smith*, 70 Fed. 383 117
Bredrick Copygraph Co. v. *Mayhew*, 131 Fed. 92 117
Brown v. *Atwell*, 92 U. S. 327 14
Cilley v. *United Shoe Mach. Co.*, 152 Fed. 726 . . . . . 87, 116
Columbian Wire Co. v. *Freeman Wire Co.*, 71 Fed. 302 . . . 117
Commercial Acetylene Co. v. *Autolox Co.*, 181 Fed. 387 . 113, 117
Commonwealth v. *Grey*, 2 Gray, 501 42
Commonwealth v. *Hunt*, 4 Met. 126 . . . . 24, 25
Commonwealth v. *Peaslee*, 177 Mass. 267 . . . . 26, 67
Crown Cork & Seal Cases, 172 Fed. 225, 174 Fed. 252 . . 117
De Saussure v. *Gaillard*, 127 U. S. 216 14
Dick Co. v. *Henry*, 149 Fed. 424 116
Dickerson v. *Tinling*, 84 Fed. 192 . . . . 87, 117
Dunbar v. *United States*, 156 U. S. 185 24
Edison Phonograph Co. v. *Kaufmann*, 105 Fed. 960 . . . 87, 117
Edison Phonograph Co. v. *Pike*, 116 Fed. 863 . . . . . . 87, 117
Field v. *Barber Asphalt Paving Co.*, 194 U. S. 618 71
Goshen Rubber Works Co. v. *Single Tire Co.*, 166 F. 431 . . 116
Grace v. *Am. Central Ins. Co.*, 109 U. S. 278 13
Grant v. *Raymond*, 6 Peters, 218 . . . . 78, 79
In Re Greene, 52 Fed. 104 28
Heaton-Peninsular Button-Fastener Co. v. *Eureka Specialty Co.*, 77 Fed. 288 . . . . 88, 89, 116
Henry v. *Dick Company*, 224 U. S. 1,
77, 78, 79, 88, 90, 91, 98, 100, 104, 105, 112, 117

PAGE

Indiana Mfg. Co. v. *Case Threshing Mch. Co.*, 154 F. 365 . . 116
Interstate Commerce Commission v. *Atchison R.R. Co.*, 149 U. S. 264 123
Kokomo Fence Machine Co. v. *Kitselman*, 189 U. S. 8. 38
Lau Ow Bew, Petitioner, 144 U. S. 47 123
Loewe v. *Lawlor*, 208 U. S. 274 46
McLish v. *Roff*, 141 U. S. 661 123
National Phonograph Co. v. *Schlegel*, 128 Fed. 733 117
New Jersey Co. v. *Schaefer*, 178 Fed. 276 117
New Jersey Patent Co. v. *Schaefer*, 144 Fed. 437 117
Otis Elevator Co. v. *Geiger*, 107 Fed. 131 116
Paper Bag Patent Case, 210 U. S. 405 80
Park v. *Hartman*, 153 Fed. 24 . . . . 86, 116
Patterson v. *Kentucky*, 97 U. S. 501 81
Pettibone v. *United States*, 148 U. S. 197 . . . . 23, 25
Robertson v. *Cease*, 97 U. S. 646 13
Rubber Tire Wheel Co. v. *Milwaukee Rubber Works Co.*, 154 Fed. 358 . . . . 86, 116
Rupp v. *Elliott*, 131 Fed. 730 . . . . 87, 116
Ex parte Smith, 94 U. S. 445 13
Standard Oil Co. v. *United States*, 221 U. S. 1 . . . . . . 47, 72
Standard Sanitary Mfg. Co. v. *United States*, 226 U. S. 20, 83, 93, 101–103, 114
State v. *Parker*, 43 N. H. 85 24
Swift & Co. v. *United States*, 196 U. S. 375 67
The Fair v. *Dover Mfg. Co.*, 166 Fed. 117 117
The Paquete Habana, 175 U. S. 677 123–125
United Shoe Machinery Co. v. *Brunet*, 1909 A. C. 330 . 108–111
United States v. *American Bell Tel. Co.*, 167 U. S. 224 . . 63, 85
United States v. *American Tobacco Co.*, 221 U. S. 106 . . . 47
United States v. *Barber*, 219 U. S. 72 . . . . 10, 16
United States v. *Biggs*, 211 U. S. 507 . . . . 11–12, 19
United States v. *Bitty*, 208 U. S. 393 7
United States v. *Carll*, 105 U. S. 611 24
United States v. *Cruikshank*, 92 U. S. 542 25
United States v. *Gooding*, 12 Wheaton, 460 25
United States v. *Hess*, 124 U. S. 483. 25
United States v. *Joint Traffic Assoc.*, 171 U. S. 505 . . . 47, 73

PAGE

United States v. *Keitel*, 211 U. S. 370 8
United States v. *Kissel*, 218 U. S. 601 . . . . 10, 16
United States v. *Mason*, 213 U. S. 115 8
United States v. *Mescall*, 215 U. S. 26 8
United States v. *Miller*, 223 U. S. 599 . . . . 10, 12, 19
United States v. *Morrisey*, 32 Fed. 147 24
United States v. *Post*, 113 Fed. 852 25
United States v. *Reading Co.* (decided December 16, 1912), 68, 115
United States v. *Rider*, 163 U. S. 132 123
United States v. *St. Louis Terminal*, 224 U. S. 383 67
United States v. *Stevenson*, 215 U. S. 190 8–9
United States v. *Swift*, 188 Fed. 92 29
United States v. *Union Pacific R.R. Co.*, 226 U. S. 61. . . . 68
United States Consolidated Co. v. *Griffin Co.*, 126 F. 364 . . 116
Victor Talking Mach. Co. v. *The Fair*, 123 Fed. 424 . . . 87, 116
Whitwell v. *Continental Tobacco Co.*, 125 Fed. 454 29

In the Supreme Court of the United States

OCTOBER TERM, 1912

No. 620.

THE UNITED STATES, *Plaintiff in Error*

v.

SIDNEY W. WINSLOW, EDWARD P. HURD, GEORGE W. BROWN, WILLIAM BARBOUR, ELMER P. HOWE, *Defendants in Error.*

In Error to the District Court of the United States for the District of Massachusetts.

BRIEF FOR DEFENDANTS IN ERROR.

PRELIMINARY STATEMENT.*

This is a writ of error from a decision of the District Court for the District of Massachusetts, sustaining demurrers to the first and second counts of an indictment purporting to charge an offence under the Sherman Act of July 2, 1890. The writ is brought under the Criminal Appeals Act of 1907, Chapter 2564, 34 Stat. 1246. The

* The statement upon the cover of the Government's brief is misleading as to each of the statements marked respectively (1), (2) (*a*) and (2) (*b*). As to (1) the indictment does not charge that the defendants have combined into one hand 80 per cent. of the entire interstate commerce in shoe machinery. (See *infra*, pp. 36, 39.) As to (2) (*a*) and (*b*) the indictment does not charge that a customer in order to secure any one kind of machine from the "combine" must agree not to use any other machine made by others and to use only machinery made by the "combine." (See *infra*, pp. 41–44.)

opinion of the District Court which appears in the record at pages 73 to 95, inclusive, deals with two separate indictments, Nos. 113 and 114, the demurrers to which were heard together in the court below.

Indictment No. 113 contained three counts, and the demurrers to all three counts were sustained, but the writ of error covers the first two counts only. Indictment No. 114 contained two counts. The first count was adjudged sufficient in law, and the demurrer overruled, and the demurrer to the second count was sustained. No writ of error was taken from this decision.

This writ of error, therefore, relates only to the decision sustaining the demurrers to the first and second counts of Indictment 113. The judgment ordered by the District Court under Indictment No. 113 was as follows:—

> "The indictment is adjudged insufficient in law; the demurrer thereto is sustained; and the respondents go therefrom without day." (Record, p. 95.)

The first count of Indictment No. 113 purported to charge the defendants with engaging in a combination to restrain their own trade in shoe machinery, which combination, it is charged, was formed on February 7, 1899, and has restrained trade from that date.

The second count of Indictment No. 113 purported to charge the defendants with engaging in a conspiracy to restrain the trade of shoe manufacturers in shoe machinery, which conspiracy, it is likewise charged, was formed on February 7, 1899, and has restrained trade from that date.

The facts alleged in both counts are practically identical. The material facts alleged are as follows:—

Practically, all shoes are and have been for twenty-five years manufactured by the aid and use of several different kinds of machines, described generally by groups, as follows, viz.: (1) lasting machines; (2) welt-sewing and stitching

machines; (3) heeling machines; and (4) metallic fastening machines. Each group contains a variety of different machines.*

Prior to February 7, 1899, the defendants Winslow, Hurd, and Brown manufactured, in Massachusetts, through the instrumentality of the Consolidated and McKay Lasting Machine Company, 60% of the lasting machines manufactured in the United States; the defendants Howe and Barbour manufactured in Massachusetts, through the instrumentality of the Goodyear Shoe Machinery Company, 80% of the welt-sewing and stitching machines and 10% of the lasting machines manufactured in the United States, and the defendant Storrow (against whom the indictment has been dismissed) manufactured in Massachusetts, through the instrumentality of the McKay Shoe Machinery Company, 70% of the heeling machines and 80% of the metallic fastening machines manufactured in the United States.

All of the machines so manufactured by the defendants through said three companies were patented and were the best of their kind, and there was no competition between the three companies or groups of defendants. The various machines performed separate consecutive operations on one product, viz., shoes, and were all essential to the manufacture of that product. The defendants shipped these machines to various shoe manufacturers, a number of whom were located in states other than Massachusetts.†

* The assumption in the Government's brief that these four groups of machines were the only machines used in the manufacture of shoes is totally unjustified. These machines performed only certain specified processes. It is a matter of common knowledge that there are numerous other processes in the manufacture of shoes for which other types of machines are required. (See *infra*, p. 36.)

† It is not charged, as the Government assumes, that the defendants conducted or controlled the larger part of the interstate trade in shoe machinery. On the contrary the presumption is that they sold their machinery largely to the great number of shoe manufacturers located in Massachusetts near their factories. They may have done only a small percentage of the total interstate trade. (See *infra*, p. 39.)

The defendants on February 7, 1899, organized the United Shoe Machinery Company, turned over to it the stocks and business of the above-mentioned three corporations, and have continued to the date of the indictment to manage its affairs, and thus through it to manufacture in Massachusetts and to market, without reducing their combined output, all the various kinds of patented machines previously manufactured by the three concerns so merged.

Prior to such merger the defendants manufactured in different factories at four different places all in Eastern Massachusetts. At some time after the new company was organized, they brought these factories together at Beverly, Mass.

Prior to such merger, the defendants, through their three above named companies, both sold and leased machines, in what proportions is not stated. At some indefinite time subsequent to such merger the defendants changed the method of marketing machines, and since that time, through the United Shoe Machinery Company, have only marketed their machines under leases containing provisions not found in their former leases, which provisions require a shoe manufacturer leasing any kinds of machines from the Company to use only machines, of some or all of the several other kinds, furnished by it, and prohibit him from using any machines, of any of those kinds, furnished him by others upon the penalty of having all machines leased him by the United Shoe Machinery Company taken away and the leases cancelled if he violates such prohibition.* No other penalty is alleged.

*As will be shown later (pp. 41–44), these provisions did not require, as assumed by the Government, that a customer in order to secure any one kind of machine from the United Company was compelled to agree not to use any other machine made by others and to use only machines made by the United Company. They merely required a shoe manufacturer leasing a machine or machines to use some or all (which for the purposes of a criminal indictment must be taken to mean some) of the other kinds of machines, and prohibited him from using machines of such kinds, (namely the kinds he was so required to use, but not all kinds) furnished by others. The entire argument of the Government, therefore, with respect to the leases is based on a false assumption.

The counts contain no other charges of unfair or improper conduct, practices, or agreements.

In brief, then, the only material facts alleged to substantiate the charge that the defendants on February 7, 1899, formed a combination or conspiracy in restraint of trade, which has restrained trade since said date are:—

1. That the defendants on February 7, 1899 turned over to the United Shoe Machinery Company the businesses of three independent but non-competing concerns engaged in manufacturing, selling, and leasing different kinds of patented shoe machinery, and have since managed the United Shoe Machinery Company's affairs.

2. That at some indefinite time subsequent thereto (and not in pursuance of any plan to do so existing at the date of the merger of the three concerns) the defendants caused the United Shoe Machinery Company to cease marketing its machines by both leasing and selling them (it not being stated to what extent they had previously sold them), and to confine itself to leasing them under leases containing certain new provisions above referred to.

The defendants propose to show that both the merger of the three companies and the leases were lawful and constituted no offence under the Sherman Act.

But they insist that the question of the legality of the leases under the Sherman Act or of the legality of the merger and leases combined is not presented by the present writ of error. Under the Criminal Appeals Act of 1907 the whole case does not come before this court for consideration, but only the particular construction, if any, of the Sherman Act on which the decision of the District Court was based. This court has no jurisdiction to consider any other questions. The construction placed upon the indictment by the District Court must be accepted by this court, as it involves only a question of general criminal law.

The District Court held as a matter of pleading that the merger of the three companies and the adoption of the

leases were not charged in either count as constituting a single offence. It, therefore, sustained the demurrers on the two following grounds: (1) because two distinct combinations or conspiracies were charged in each count which made the counts invalid for duplicity, and (2) because, if a single combination or conspiracy was charged in each count, and thus the charge of duplicity could be said to be avoided, such combination or conspiracy consisted, upon a proper construction of the indictment, solely of the merger of the three companies, which merger, considered apart from the leases, was lawful under the Sherman Act. The District Court declined to consider whether the counts would have been sufficient if they had properly charged that the offence consisted solely of the leases or of both the merger and the leases combined.

The District Court's first ground of decision, namely, that the two counts were invalid for duplicity, involved no construction of the Sherman Act, and, therefore, presents no question to this court. Its second ground of decision, namely, that, if the counts did charge a single combination or conspiracy, such combination or conspiracy consisted solely of the merger of the three companies and that such merger was not condemned by the Sherman Act, involved two steps: (*a*) the proper construction of the indictment (which involved no construction of the Sherman Act and presents no question to this court); and (*b*) the holding that the merger was lawful under the Sherman Act. Only in taking this last step did the District Court construe the Sherman Act, and, therefore, the sole question presented for this court's consideration is whether the Sherman Act, properly construed, penalizes such a merger (considered apart from the leases), as this was the only construction of the Sherman Act involved in the District Court's decision. If, therefore, the District Court committed no error in holding that the merger of the three non-competing companies was lawful, no further question is presented to this

court, and the judgment of the lower court should be affirmed.

THE QUESTIONS BEFORE THIS COURT.

THE JURISDICTION OF THE COURT UNDER THIS WRIT OF ERROR.

On this writ of error the only questions before this court are (*a*) whether the District Court construed the Anti-trust Act of July 2, 1890, in its decision or judgment sustaining the demurrers to count one and count two of said indictment 113, and, (*b*) if so, whether the District Court erred in its construction.

The clause of the Criminal Appeals Act of March 2, 1907, Chapter 2546, 34 Stat. 1246, in question, is as follows:—

A writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court.

> " . . . From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded."

The following are leading cases in which the Supreme Court has construed the Criminal Appeals Act.

In *United States* v. *Bitty*, 208 U. S. 393, the Supreme Court said, by Mr. Justice Harlan, at page 400, the court below having sustained a demurrer and dismissed an indictment:—

> "If a court of original jurisdiction errs in quashing, setting aside or dismissing an indictment for an alleged offence against the United States, upon the ground that the statute on which it is based is unconstitutional, or upon the ground that the statute does not

> embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review. Hence—that there might be no unnecessary delay in the administration of the criminal law, and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced—the above act of 1907 was passed." (Black-letter ours.)

In *United States* v. *Keitel*, 211 U. S. 370, where the court below quashed the indictments and there were also demurrers involved, it was held that only the particular questions for which the statute provides (namely, the constitutionality of the statute or its construction), decided by the court below, could be considered; that the whole case was not open to review in this court on direct writ of error under the Act of March 2, 1907, and that the question whether the court below misconstrued the indictment, or whether there were such defects in the indictment that it was rightly quashed, irrespective of the construction of the statutes, was not before this court.

In *United States* v. *Mason*, 213 U. S. 115, where there were special pleas in bar and also demurrers to the indictment on various grounds, and where the case went up upon the special pleas in bar, it was held, following *United States* v. *Keitel*, supra, that this court could not consider the various grounds of demurrer to the indictment.

In *United States* v. *Mescall*, 215 U. S. 26, it was held that the inquiry of the court was limited to the particular question decided by the court below.

In *United States* v. *Stevenson*, 215 U. S. 190, Mr. Justice Day said at page 194:—

> "The District Court, upon demurrer to the indictment, held the second count thereof to be invalid, because the sole remedy for a violation of the statute

was in a civil action for the recovery of a penalty under §5 of the act. The court also held the second count bad because it did not sufficiently specify the acts of assistance constituting the alleged offence. . . .

"From this statement it is apparent that the court below proceeded upon two grounds, one of which concerned the construction of the statute, the other of which decided the invalidity of the indictment upon general principles of criminal law. . . .

"We are here confronted with a case in which a decision of the court below sustaining a demurrer to an indictment involves not only the construction of a Federal Statute, but another ground upon which the decision was also rested, which involves the sufficiency of the indictment on general principles.

"The object of the criminal appeals statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offences under such acts when this court should be of opinion that the statute, properly construed, did in fact embrace an indictable offense. Inasmuch as the United States could not bring such a case here after final judgment, it was intended to permit a review of such decisions as are embraced within the statute, at the instance of the Government, in order to have a final and determinative construction of the act and to prevent a miscarriage of justice if the construction of the statute in the court below was unwarranted. . . .

"As the question of general law involved in the decision of the court below is not within either of the classes named in the statute, giving a right of review in this court, we must decline to consider it upon this writ of error."

At page 200:—

"We therefore reach the conclusion that the court erred in sustaining the demurrer to the second count of the indictment, so far as that ruling is based upon the construction of the statute in question."

In *United States* v. *Kissel*, 218 U. S. 601, at page 606, Mr. Justice Holmes said:—

> "We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the Act of March 2, 1907, c. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States* v. *Keitel*, 211 U. S. 370, 399. We think that there is a similar limit when the case comes up under the other clause of the act, from a 'judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.' This being so, we are not concerned with the technical sufficiency or redundancy of the indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged."

A similar view was held by the court in *United States* v. *Barber*, 219 U. S. 72, and in *United States* v. *Miller*, 223 U. S. 599, at page 602.

Under these decisions it is clear that the jurisdiction of this court is limited to the question whether the decision of the District Court sustaining the demurrers to counts 1 and 2 of the indictment involved an erroneous construction of the Sherman Act. In so far as the District Court sustained the demurrer on grounds independent of any construction of the Sherman Act this court has no jurisdiction to review its decision. If this court finds that the District Court's construction of the Sherman Act, in so far as such construction was involved in the District Court's judgment sustaining the demurrer, was correct, then the judgment of the District Court must be affirmed. If this court should find that the District Court in its opinion misconstrued the Sherman Act, nevertheless, if upon a proper construction of the act the same result should be

reached, then also the judgment of the lower court should be affirmed.

As this court's jurisdiction is limited to the construction of the Sherman Act, it follows that it must accept the District Court's decision as to all other matters. It has no jurisdiction to consider the construction of the indictment as distinguished from the construction of the Sherman Act. Unless, therefore, the construction of the indictment by the District Court necessarily involved a construction of the Sherman Act, this court must accept the indictment as construed by the District Court, whether such construction was right or wrong.

In *United States* v. *Biggs*, 211 U. S. 507, page 518, Mr. Justice (now Mr. Chief Justice) White said:—

> "It is also settled by *United States* v. *Keitel*, supra, that the right given to the United States to obtain a direct review from this court of the rulings of the lower court on the subjects embraced within the statute of 1907 does not give authority to revise the action of the court below as to the mere construction of an indictment, and therefore in the exercise of our power to review on this record we must accept the construction of the indictment made by the lower court and test its construction of the statute in that aspect.
>
> "While not questioning this general rule, the United States insists that the case here presented is an exception to that rule, because of the contention that the construction given by the court below to the indictment was but the necessary result of the misconstruction which the court applied to the timber and stone act, and hence that a review of the construction given to the indictment is necessarily involved in the determination of the correctness of the construction given by the court to the statute. Conceding the premise for the sake of argument, the deduction by which it is sought to apply it to the case in hand is, we think, without foundation. It proceeds upon a subtle separation of the particular words or phrases in the indictment from the context of that pleading and the affixing to

the words thus separated a penetrating but, nevertheless, too narrow significance for the purpose of establishing the proposition relied upon. On the contrary, we think the conclusion cannot be escaped that the construction given by the court below to the indictment was the result merely of the analysis which the court made of the indictment as an entirety, of its appreciation of the nature and character of the acts therein referred to and of the overt acts alleged, the whole read in the light of the elementary canons of construction applicable to criminal pleadings and elucidated, as the court expressly stated, by the entire absence of anything in the indictment tending to show that the pleader contemplated alleging the existence of any conspiracy to induce the making of applications to purchase." (Black letter ours.)

In *United States* v. *Miller*, 223 U. S. 599, page 602, Mr. Justice Van de Vanter said:—

"We say this is the question for decision because it appears from the record that the Circuit Court, in sustaining demurrers to the indictments, placed its decision solely upon the ground that they did 'not allege that the schedules and tariffs alleged to have been violated were posted in the manner required by law,' and because upon these direct writs of error we must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision. *United States* v. *Keitel*, 211 U. S. 370, 398; *United States* v. *Kissel*, 218 U. S. 601, 606." (Blackletter ours.)

This court, therefore, has not jurisdiction to reverse the judgment of the District Court on the ground that, although the indictment as construed by the District Court did not charge a crime within the proper meaning of the Sherman Act, yet, if the indictment had been properly construed, it would have charged such a crime. To do so would be to hold, not that the judgment of the District

Court was based upon or involved an erroneous construction of the Sherman Act, but that it was based upon an erroneous construction of the indictment,—a matter which is wholly within the jurisdiction of the District Court.

One further proposition relating to the jurisdiction of this court remains to be noted.

The appellate jurisdiction of this court rests wholly on the acts of Congress. *United States* v. *Sanges*, 144 U. S. 310. With respect to writs of error under the Act of 1907, therefore, this court is a court of limited jurisdiction. Being such, its jurisdiction must be made to appear affirmatively. It follows that this court will not consider that any question decided by the District Court was based upon a construction of the Sherman Act, unless this fact is made to appear affirmatively. Nor because it appears that the District Court's decision is based on one particular construction of the Sherman Act will this court assume that any other construction of the act was also involved unless it so appears affirmatively.

Mr. Justice Harlan in *Grace* v. *American Central Insurance Company*, 109 U. S. 278, at page 283, in speaking of the jurisdiction of the Circuit Court, said:—

> "As the jurisdiction of the Circuit Court is limited, in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction, unless the contrary affirmatively appears."

See also *Ex parte Smith*, 94 U. S. 445.
Robertson v. *Cease*, 97 U. S. 646.

In this respect the jurisdiction of this court is similar to its jurisdiction with reference to cases arising on writs of error from state courts.

It has been frequently decided that, to give this court jurisdiction of such cases, it must appear affirmatively

that a Federal question was presented to the State Court for decision, and that its decision was necessary for the determination of the case.

De Saussure v. *Gaillard*, 127 U. S. 216.
Brown v. *Atwell*, 92 U. S. 327.

THE DISTRICT COURT SUSTAINED THE DEMURRERS ON TWO GROUNDS: (1) BECAUSE TWO DISTINCT COMBINATIONS OR CONSPIRACIES WERE CHARGED IN EACH COUNT WHICH MADE THE COUNTS INVALID FOR DUPLICITY; AND (2) BECAUSE, IF A SINGLE COMBINATION OR CONSPIRACY COULD BE SAID TO BE CHARGED IN EACH COUNT, IT CONSISTED SOLELY OF THE MERGER OF THE THREE COMPANIES, WHICH MERGER WAS NOT MADE UNLAWFUL BY THE SHERMAN ACT.

For the decision of the District Court we must look to the opinion of the court set out in the Record, page 73 and following pages.

As the opinion of the lower court is largely taken up with the discussion of indictment 114, which indictment does not appear in the record, (the indictment here in question being numbered 113), it may be well to state that the first count of that indictment, as appears from the opinion, charged the defendants with monopolising the shoe machinery business by a series of acts alleged to have taken place at different specified times from February 7, 1899, on, such acts consisting of the merger of four previously independent concerns into the United Company, the adoption of certain leases (the provisions of which differed materially from the leases set out in the present indictment),

certain purchases of other properties, and the driving out of business of certain concerns. The second count of that indictment referred for particulars to the first count, and charged a conspiracy to monopolize by engaging throughout the period of time specified in the first count in the unlawful acts therein set forth.

That the decision of the District Court was based upon the grounds above stated is shown by the following quotations from the opinion of the District Court.*

At page 94 of the Record the court says:—

> "Indictment 113 is easily disposed of. We have already shown that the third count is invalid. **The first and second counts are invalid for the same reason which invalidates the second count of indictment 114.** This indictment 113 was evidently framed to bring out the question whether the fact that various machines manufactured by the United Shoe Machinery Company are protected by patents in whole or in part, is of importance in this connection. **As the result we reach cuts under this question,** we prefer to postpone its consideration, hoping that the Supreme Court may have to dispose of it in some way before we are forced to proceed with it if ever." (Blackletter ours.)

At pages 73 and 74 of the Record we find the following statement referring to the second count of indictment 114, being the first reference of the District Court thereto:—

> "The offence under the first section permits in one count an allegation of only a single transaction, that is, an allegation of making one contract, or engaging in one combination or conspiracy, so that while, by virtue of the decisions of the Supreme Court in *United*

*While the determination of what the court decided as to these counts in question is slightly complicated by reason of the fact that the District Court rendered but one opinion on the two indictments, 113 and 114, so that the views of the court have to be picked out from various passages in the entire opinion, yet the court has sufficiently and carefully indicated its reasons for its decision.

States v. *Kissel*, 218 U. S. 601, 607, and *United States* v. *Barber*, 219 U. S. 72, 78, such a combination or conspiracy, when once effected, may be continuous, yet only one contract or one conspiracy can properly be alleged in any one count. **For this reason, as we go on, we will find that the second count, under the circumstances of the case, must be held invalid in law.**" (Blackletter ours.)

This is a clear statement that the court held the count bad for duplicity.

At page 91 of the Record the court proceeds as follows:—

"Taking up again the second count in indictment 114, which refers back for all details to the first count, it plainly alleges only a conspiracy. It states that the respondents 'unlawfully and knowingly conspired to monopolize.' This expression is plainly adapted to a combination only. Therefore we accept this count as such, leaving the first count of indictment 114, which we will approach later, as alleging a completed monopoly under the second section of the act.

"Coming back, therefore, to the proposition that the second count alleges only a conspiracy, the rules of pleading confine it to one conspiracy. As said in *United States* v. *Kissel*, 218 U. S. 601, *ubi supra*, and according to the clear rules of law, it may well be regarded as a continuous conspiracy. Nevertheless, as was said on page 608, 'the contract is instantaneous,' though 'the partnership may endure as one and the same partnership for years'; adding, 'a conspiracy is a partnership in criminal purposes.' **Therefore it follows that the whole offence under the second count of indictment 114 is a combination formed on the seventh day of February, 1899, with the purposes and intentions then existing which we have described, and nothing more. This combination, then formed, was purely an economic arrangement,** not in violation of any rule in restraint of trade at common law, or which has been announced by the Supreme Court, as is shown by an examination of all the cases decided by that tribunal.

"It seems to be impossible to deny that the combination of various elements of machinery, all relating to the same art and the same school of manufactures for the purpose of constructing economically and systematically, and of furnishing any customer, the whole or any part of an entire system, is in strict and normal compliance with modern trade progress; as also it might be in strict compliance with modern progress to limit the manufacture and supply to certain details, as, for example, steam gauges, wheels for railroad cars, or axles for steam locomotives, without furnishing anything else, although by so doing, the manufacturer of details becomes able to command the entire market. It is absolutely normal, and in accordance with the rightful demand of the market, for any dealer to supply mere details or an entire system of machinery, according as his customers may desire." (Blackletter ours.)

It, therefore, appears from the above quotations that the District Court first held at page 73 of the Record that the second count of indictment 114 was bad, because of duplicity, and that on page 91 of the Record the court held that, if a single conspiracy could be said to be charged, it consisted only of "the combination formed on the seventh day of February, 1899, with the purposes and intentions then existing which we have described and nothing more," and that this combination was lawful.

The court's opinion clearly shows that the purposes and intentions referred to in the indictment did not include the adoption of the system of leases. In other words, that if the indictment could be construed as charging only a single conspiracy or combination, such combination or conspiracy consisted solely of the merger of the three companies, and that the counts did not properly allege that the system of leases was a part of such combination or conspiracy, or was included in its purposes or intentions, but that their adoption and use was merely alleged as an act occurring subsequent thereto, and not as a part thereof.

THE DISTRICT COURT'S DECISION THAT THE COUNTS WERE BAD FOR DUPLICITY AND THAT, IF THEY ONLY CHARGED ONE COMBINATION OR CONSPIRACY, IT CONSISTED SOLELY OF THE MERGER OF THE THREE COMPANIES, INVOLVED MERELY A CONSTRUCTION OF THE INDICTMENT AND NOT A CONSTRUCTION OF THE SHERMAN ACT, AND MUST, THEREFORE, BE ACCEPTED BY THIS COURT. SUCH DECISION WAS FURTHERMORE CORRECT AS A MATTER OF GENERAL CRIMINAL LAW.

This decision was based upon the general principles and rules of pleading. It was in no wise based upon a construction of the Sherman Act.

The District Court did not hold that the adoption of the leases alone, or both the merger and the adoption of the leases could not be properly pleaded in one count as a single combination or conspiracy under the Sherman Act. It merely held that in this particular indictment the merger alone was charged as the offence, and that both the merger and the leases were not charged as constituting a single combination or conspiracy, and that no connection was charged between the original combination and the leasing policy subsequently adopted.

The District Court did not hold that, if the United States had alleged that it was the purpose and intention and part of the scheme of the defendants at the time of the original merger to adopt the leases, or if it had alleged that the defendants intended at that time not only to form the merger, but to do some further unlawful acts to accomplish their ends and that the leases were adopted in pursuance

thereof, the question would not have been properly raised as to whether the combination or conspiracy so charged, consisting of both the merger and the leases combined, constituted an offence under the Sherman Act.

As the District Court held the first count of indictment 114 sufficient on the ground that it included both the merger and the leases, by implication it would have held the second count of indictment 114 sufficient if, in the view of the court, it also had as a matter of pleading properly charged both, as constituting a single combination or conspiracy.

This does not mean that the court would have held counts one and two of indictment 113 which alone are before this court sufficient, as they not only set forth that the defendant's machines were all patented (an allegation omitted in the counts of indictment 114), but contained a somewhat different statement of facts in other particulars.

In other words, because counts one and two, as a matter of general criminal pleading, did not raise the question of the effect of the merger and leases combined, or of a combination or conspiracy to use both, the District Court ruled that the only combination or conspiracy was the formation of the new company and its continuance.

As pointed out in *United States* v. *Biggs* and *United States* v. *Miller*, supra, this court is bound by the District Court's construction of the indictment as a matter of general criminal law, and must adopt the District Court's construction, whether right or wrong.

It may be well, however, to point out briefly that the District Court's decision was correct.

1. First, with reference to the decision that the counts were bad for duplicity.

The counts allege that continuously from February 7, 1899, to the date of the indictment, the defendants engaged in a corrupt combination which at all times since said date has restrained interstate commerce. They then set forth

the merger of the three companies, and after this, in a separate paragraph, allege that the defendants, in carrying on the business of the new company, ceased to sell machinery (to whatever extent it had formerly been sold, as to which there is no averment), and confined themselves to leasing it upon leases containing the alleged oppressive provisions.

It is not alleged that the complainants at the time of the original merger contemplated or planned either the leases or any further acts. It is further clear that the offence stated is alleged as having begun on February 7, 1899; that is, that it existed on said date and at all times thereafter. This can clearly refer only to the merger.

The adoption of the leases being alleged as something occurring later and not connected with the merger may properly be regarded as a charge of a distinct offence.

It seems clear, therefore, that the District Court was justified in holding that the counts were bad for duplicity.

2. Next as to the decision that, if the counts alleged but a single combination or conspiracy, such combination or conspiracy consisted solely of the original merger.

The reasoning is much the same as the reasoning by which the court reached the conclusion that the counts were bad for duplicity.

We will consider the first count by itself.

It alleges that continuously and at all times from February 7, 1899, to the date of the indictment, the defendants have engaged in a corrupt combination in restraint of interstate business, which since said day has been carried on by the defendants: "that is to say, the combination now here described . . . and which at all times since said seventh day of February in the year eighteen hundred and ninety-nine. . . " has restrained said interstate business "in the manner and by the means now here set forth." . . . (Record, pp. 19 and 20.)

In the next paragraph the organization of the United

Company and the transfer to it of the stocks and business of the three previously existing companies is set out, it being alleged that the new corporation was formed on February 7, 1899, and that the stocks and business of the other three corporations were thereupon turned over to it.

Note that this merger took place February 7, 1899, and is, therefore, clearly the alleged wrongful combination charged in the indictment as existing from said date, as no other acts are alleged as having taken place at that time and no intent is stated as existing at that date to do any other acts.

It is next charged that the defendants "in so as last aforesaid carrying on, with the design and intent aforesaid," said interstate business, have confined themselves to leasing their machines upon leases containing the specified oppressive provisions. (Record, p. 21.)

Note that this is a statement of something occurring after the merger and it is not charged that such action was contemplated at the time of the merger, or that the combination charged consisted both of the merger and of the above conduct. The adoption of the leases is at best alleged as mere matter of aggravation.

This interpretation is made conclusive by the descriptive clause next succeeding, which charges that such turning over to the new company of the stocks and business of the three previously existing companies and the acceptance and holding thereof by the new company constituted a device for evading the provisions of the Sherman Act, and was and is a mere combining and placing of such stocks and business in trust in a manner made unlawful by said act.

The reference here again is clearly to the merger of the three corporations alone, and not to the adoption of the leases.

The second count, with respect to the above matter of construction, is for practical purposes the same as the first count, except that the word "conspiracy" is substi-

tuted for the word "combination," and the second count, therefore, need not be analyzed separately.

As a question, then, of the fair construction of these counts, the decision of the District Court was correct.

THE ONLY CONSTRUCTION OF THE SHERMAN ACT INVOLVED IN THE DISTRICT COURT'S DECISION, AND, THEREFORE, THE ONLY QUESTION PRESENTED TO THIS COURT, IS WHETHER THE MERGER OF THE THREE COMPANIES WAS LAWFUL UNDER THE SHERMAN ACT.

We have shown that the District Court's decision that the counts were bad for duplicity involved no construction of the Sherman Act. We have further shown that the District Court's finding that, if the counts alleged but a single combination or conspiracy, such combination or conspiracy consisted only of the merger of the three concerns and the continuance of that merger, likewise involved no construction of the Sherman Act. There was only one further step involved in the court's judgment, namely, the decision that such merger and its continuance (considered apart from the leases) was valid under the Sherman Act. In taking this last step, and only in taking this last step, the District Court construed the Sherman Act. As this writ of error presents only the particular construction of the Sherman Act on which the District Court's judgment was based, it follows that the question presented to this court is whether the District Court erred in holding that the Sherman Act did not make such merger unlawful. If the court did not err in this, if the merger was lawful under the Act, the judgment of the District Court should be affirmed.

It should be further noted that such construction of the Sherman Act by the District Court becomes a moot question in this particular case, as whether the District Court was right or wrong in its construction of the Sherman Act, this case is already decided on an independent ground, namely, on the ground of duplicity, and, if this court should find that the District Court erred in its construction of the Sherman Act, it would simply make an order, as it did in the case of *United States* v. *Stevenson*, supra, where the judgment of the District Court was based upon two grounds,—one of general law and one of construction of the statute,—and say that the judgment should be reversed and the case remanded for further proceedings in conformity with the opinion rendered.

RULES APPLICABLE TO INTERPRETATION OF AN INDICTMENT.

As the United States is here proceeding by indictment and not by bill in equity, the general rules of criminal law obtaining with reference to the certainty and particularity of allegations apply.

In *Pettibone* v. *United States*, 148 U. S. 197, Chief Justice Fuller, speaking for this court, said,—

> "The general rule in reference to an indictment [in that case for conspiracy] is that all the material facts and circumstances embraced in the definition of the offence must be stated, and that if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not by implication or by way of recital."

Chief Justice Shaw in the leading case of *Commonwealth* v. *Hunt*, 4 Met. 111, said,—

> "Conspiracy is an offence which especially demands the application of that wise and humane rule of the common law that an indictment shall state with as much certainty as the nature of the case will admit the facts which constitute the crime intended to be charged."

In *State* v. *Parker*, 43 N. H. 85, the court said,—

> "It is never enough that the purpose or the means are so described that they may be unlawful. If that is left uncertain the indictment is fatally defective. It must appear to the court that if the facts alleged are proved, as stated, without any additional fact or circumstance, there can be no doubt of the illegality of the conduct charged, nor of its criminality."

The provisions of United States Revised Statute, Section 1025, are not to be construed as permitting the omission of any matter of substance.

United States v. *Carll*, 105 U. S. 611.

This section is not applicable where the only defect complained of is that some element of the offence is stated loosely and without technical accuracy.

Dunbar v. *United States*, 156 U. S. 185, at 192.

In *United States* v. *Morrisey*, 32 Fed. 147, Judge Brewer, afterwards Mr. Justice Brewer, said,—

> "It is a familiar rule of criminal practice and pleading that nothing is taken by intendment. The fact

must be charged and charged distinctly. We cannot by inference fill out an incomplete charge."

See also *United States* v. *Post*, 113 Fed. 852, at 854.
United States v. *Cruikshank*, 92 U. S. 542 at 558.

This court said in *United States* v. *Gooding*, 12 Wheaton, 460, by Mr. Justice Story,—

"There is no reason in a criminal case why the court should help any such defective allegations,"

and in *United States* v. *Hess*, 124 U. S. 483, at page 486,—

"The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital."

ALLEGATIONS OF INTENT.

It is a well recognized general rule that allegations of intent do not by themselves charge any crime. In the case of a completed crime the acts must be so fully specified as to show that the crime was committed. In the case of a conspiracy to commit a crime, the end to be accomplished must be fully set out and shown to be unlawful (and any attendant circumstances necessary to make it unlawful specified), or the means to be used must be fully specified so as to show that they are unlawful.

Commonwealth v. *Hunt*, 4 Met. 111.
Pettibone v. *United States*, 148 U. S. 197.

Furthermore, in the case of a conspiracy where the means are specified or are required to be specified, it must appear that the means to be used are such as would be likely to

accomplish the end sought. Otherwise, there will be no dangerous probability that the criminal purpose was to be accomplished.

Commonwealth v. *Peaslee*, 177 Mass. 267.

It is important to distinguish allegations of intent set forth in the preamble or introductory portion of the indictment from the allegations charging the crime, that is, in the case of a conspiracy the allegations charging the object which the conspirators agreed to accomplish, and the means which they agreed to adopt to accomplish the object. The two are entirely distinct.

The rule as to the effect of allegations of intent is well expressed in the leading case of *Commonwealth* v. *Hunt*, supra, by Chief Justice Shaw, where he says (p. 128),—

> "Now it is to be considered, that the preamble and introductory matter in the indictment—such as unlawfully and deceitfully designing and intending unjustly to extort great sums, &c.—is mere recital, and not traversable, and therefore cannot aid an imperfect averment of the facts constituting the description of the offence. The same may be said of the concluding matter, which follows the averment, as to the great damage and oppression not only of their said masters, employing them in said art and occupation, but also of divers other workmen in the same art, mystery and occupation, to the evil example, &c. If the facts averred constitute the crime, these are properly stated as the legal inferences to be drawn from them. If they do not constitute the charge of such an offence, they cannot be aided by these alleged consequences."

But even if intent can be held in any case to have any further effect than that stated by Chief Justice Shaw; if, in other words, it can be taken to show that some illegal object is sought (which we believe it cannot), it is respectfully submitted that in dealing with the new class of crimes

contemplated by the Sherman Act, a general allegation of intent can have no such effect. In regard to such crimes there must be further and careful consideration of the character and nature of any general allegations of intent.

As this court has decided, all restraints of trade and monopolies are not unlawful, nor is every combination or conspiracy in restraint of trade unlawful. No other view is possible. Even the most innocent enterprise or trade agreement involves all these features. Every man who is in business is seeking to restrain the trade of his competitors, to monopolize business, and to eliminate competition so far as possible. Such an attitude is essential to the maintenance of real competition. An "intent" to do these things is not in and of itself contrary to law. An allegation of such an "intent" in an indictment is not sufficient to show that an unlawful end is in view. The Sherman Act only condemns undue restraints or monopolies. It is, therefore, only when the means used are specifically shown to be improper, or possibly where the extent or character of the restraint or monopoly in view of all the attendant circumstances is shown to be unlawful or undue, that there is a violation of law.

In such a case, therefore, a mere allegation of intent to restrain trade or to monopolize in and by itself imports absolutely no illegality. We must look to the facts alleged to see if any crime is charged, and these facts must show not only that a restraint of trade was to be accomplished or attempted, but also that owing to the means used, or to the attendant circumstances, it was to be an undue, and, therefore, an unlawful restraint.

The allegations of intent in the present indictment, omitting the use of the words "unlawfully" and "oppressively," charge that "each of such defendants" desiring to extend his patent monopolies and rights, and to use the same to build up an additional power and control over the business in which he was engaged to be used for grasping

and drawing to the business of all the groups of defendants the trade of others, for controlling and enhancing prices and discouraging and preventing others from inventing or manufacturing other devices and machines "engaged in a corrupt competition in undue, unreasonable and direct restraint of interstate business, trade, and commerce, . . . that is to say, the combination now here described . . ." which has in fact restrained said trade "in the manner and by the means now here set forth."

It is important to note that these allegations are a part of the preamble or introductory matter, and that they are not charged as a part of the combination or conspiracy, that is, as the objects of the combination or conspiracy which the defendants mutually agreed to accomplish. The combination or conspiracy it is expressly charged consisted of engaging in certain acts. These allegations of intent import absolutely no illegality in and by themselves, unless the facts referred to show that a restraint of trade was contemplated or accomplished which was undue or unlawful, either because of the attendant circumstances or because of the means to be employed.

In *In re Greene*, 52 Fed. 104, at page 111 Mr. Justice Jackson (then circuit judge), in one of the earliest cases under the Sherman Act said:—

> "Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statute, but by the specific acts or particular facts, which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused 'engaged in a combination,' or 'made contracts in

restraint' of such trade or commerce, or 'monopolized' or 'attempted to monopolize' the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute: '*Every offense consists of certain acts done or omitted under certain circumstances*, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth.' *U. S.* v. *Cruikshank*, 92 U. S. 542, 563." (Italics ours.)

In *Whitwell* v. *Continental Tobacco Company*, 125 Fed. 454, at page 457 Judge Sanborn said:—

"The general averments of the intent, purpose, and effect of the acts of the defendants may therefore be laid aside here. They serve no purpose save to foreshadow the argument of counsel relative to the legal effect of the facts which the complaint sets forth. They neither state, nor aid in the statement of, any cause of action, because they disclose no fact, and the only question here is whether the facts stated in the complaint constitute a cause of action."

In *United States* v. *Swift*, 188 Fed. 92, at page 99 Judge Carpenter said,—

"This brings us to the question whether or not the indictments charge facts sufficient in law to support a conviction under the Sherman Act, and for answer *we must look to the facts stated, and not to any conclusion drawn from those facts by the Grand Jury.*" (Italics ours.)

FACTS ALLEGED IN THE INDICTMENT

First Count

In substance, this count alleges that for twenty-five (25) years last past all shoes worn in the United States have been manufactured by the use of several different kinds of machines, hereafter referred to as shoe machinery, for doing the several different kinds of work pertaining to such manufacture, a general description of said machinery by groups being as follows:—

Lasting Machines, used for the purpose of lasting the uppers of shoes.

Welt-sewing Machines and Out-sole Stitching Machines, used for the purpose of attaching the upper to the out-sole of a turned shoe, and the upper and welt to the insole, and the welt of a welted shoe to its out-sole.

Heeling Machines, used for preparing and attaching heels.

Metallic Fastening Machines, used for the purpose of preparing and inserting metallic fastenings.

That each group comprises a variety of machines.

That such shoe machinery is indispensable for the manufacture of shoes in quantities sufficient to meet the demand.

Shoe manufactories have come into existence in divers places in the United States, and are maintained in thirty-four (34) states and territories of the Union, including the State of Massachusetts. Of 1,300 shoe manufacturers alleged to exist at the present day, a partial list of 316 is given, of whom 164, or more than half, are in Massachusetts.

"Because the best of such machines have been and are manufactured under letters patent of the United States by others [than the shoe manufacturers themselves] as hereinafter shown . . . and because all of such machines have been and are very expensive to manufacture it has been

throughout said period of twenty-five years impracticable for such shoe manufacturers to manufacture their own shoe machinery, and for the fore-going reasons, and for reasons hereinafter set forth, they have been under the necessity of obtaining the same principally from the defendants . . ."

Prior to February 7, 1899, defendants Winslow, Hurd, and Brown, as directors and stockholders, managed and controlled the business of the Consolidated & McKay Lasting Machine Company. James J. Storrow (the indictment has been nol prossed as to Storrow), as director and stockholder, managed and controlled the business of the McKay Shoe Machinery Company. Defendants Barbour and Howe, as directors and stockholders, managed and controlled the business of the Goodyear Shoe Machinery Company.

Winslow, Hurd, and Brown, through the Consolidated & McKay Lasting Machine Company at Beverly, Massachusetts, manufactured lasting machines, under letters patent, to the extent of 60% of all lasting machines manufactured in the United States. Storrow, through the McKay Shoe Machinery Company, manufactured at Winchester and Lawrence, Massachusetts, heeling and metallic fastening machines, under letters patent, to the extent of 70% of the heeling machines and 80% of the metallic fastening machines manufactured in the United States. Barbour and Howe, at Beverly, Massachusetts, through the Goodyear Shoe Machinery Company, manufactured welt-sewing and out-sole stitching machines, under letters patent, to the extent of 80%, and lasting machines, under letters patent, to the extent of 10% of all such machines manufactured in the United States.

All the defendants shipped the patented shoe machinery so manufactured, in pursuance of contracts of sale and lease, to shoe manufacturers, and thus as to such of said shoe manufacturers as were located in other states than

Massachusetts, they carried on trade and commerce among the several states.

Said groups of defendants, prior to February 7, 1899, were independent of each other, and each group carried on its own interstate trade free from any self-restraint and from any restraint by the other groups as to customers, number of machines sold or leased, prices or rental for shoe machinery, and terms of sale or lease. Said interstate trade has since February 7, 1899, been carried on by the defendants in the manner and under the restraint hereinafter set forth.

The defendants knowing the premises and none of them being satisfied with the enjoyment of the lawful monopolies and rights belonging to them under letters patent, and each of the defendants "designing and intending unlawfully, unduly and unreasonably to extend and expand said monopolies and rights and enhance the value thereof to said groups respectively at the expense of said shoe manufacturers and the public generally, oppressively to use the same as a means of building up for each of said groups over and above the power and control warranted and permitted by said letters patent, an additional power over and control of the portion of said interstate business, trade and commerce so carried on by each of said groups, and to use that power and control when so built up for grasping and drawing to all of said groups in combination that portion thereof carried on or which but for the conduct of said defendants in the premises might have been carried on by others, for controlling and enhancing the prices of such shoe machinery, for discouraging and preventing others from inventing or manufacturing other devices and machines for doing the work done by the machines so by said defendants manufactured, sold and leased as aforesaid, and that done by parts of said machines, and from furnishing such other devices and machines to the shoe manufacturers aforesaid in competition with the above mentioned patented ma-

chines of said defendants, all to the great profit of themselves and injury to said shoe manufacturers and the public generally, unlawfully have engaged in a corrupt combination in undue, unreasonable and direct restraint of said interstate business, trade and commerce, which, as aforesaid, since said day has been carried on by said defendants; **that is to say, the combination now here described for unduly, unreasonably and directly restraining, and which at all times since said seventh day of February in the year eighteen hundred and ninety-nine . . . has in fact unduly, unreasonably and directly restrained said interstate business, trade and commerce in the manner and by the means now here set forth, to wit."**

The defendants on February 7, 1899, organized under the laws of New Jersey a corporation, to wit, the United Shoe Machinery Company, and became officers, directors, and members of its executive committee and in the active management and control of its affairs. They immediately turned over to the United Shoe Machinery Company and caused that corporation to accept and hold the stocks and business of the three corporations, in the names of which they before carried on said interstate trade, and together have continued to manage and conduct, through the instrumentality of the United Shoe Machinery Company, all the business before independently carried on by said three groups of defendants, including the interstate trade aforesaid.

And the defendants in so, as last aforesaid, carrying on with the design and intent aforesaid the interstate business formerly independently carried on by them by groups have ceased to manufacture at Boston and Lawrence and have manufactured all such shoe machinery at Beverly in Massachusetts, have ceased to sell shoe machinery, have confined themselves to leasing the same on written leases containing provisions not found in their former leases, namely, provisions whereby any of said shoe

manufacturers leasing any of such kinds of machines have been bound to use in their manufacturing business only machines, of some or all of the several other kinds aforesaid, furnished to them by said defendants, and were prohibited from using any machines, of any of those kinds, furnished or offered to them by other shoe machinery manufacturers, and this upon penalty of having all machines leased to them by said defendants immediately reclaimed and taken away by said defendants and the leases thereof cancelled if they violated such prohibition, and have continually pursued this policy.

The organization of the United Shoe Machinery Company, the turning over to it of the stocks and businesses, constituted a mere device for evading the Sherman Act. Because said groups have ever been and now are independent of each other, and the defendants have been and are able to carry on said interstate trade without restraining themselves and without any of such groups being restrained by the others, and have been able to abolish and discontinue the use of said device and withdraw said stocks and businesses, such turning over to, acceptance, and holding by the United Shoe Machinery Company of such stocks and businesses of the other three corporations is in effect a mere combining and placing of those stocks and interstate trade in trust in a manner made unlawful by the act of Congress.

Second Count.

The second count in almost precisely similar language, and with the same allegations, charges a conspiracy to restrain the trade of shoe manufacturers in shoe machinery.

IMPORTANT FACTS INCLUDED IN AND IMPORTANT FACTS OMITTED FROM THE INDICTMENT.

(*a*) During twenty-five years last past it has been impracticable for shoe manufacturers to manufacture their own machines, because the best of such machines have been manufactured under letters patent by others [than the shoe manufacturers], and because all such machines have been very expensive to manufacture.

(*b*) **The defendants have manufactured exclusively machines covered by letters patent of the United States.**

It is distinctly alleged that each of the three concerns was manufacturing its machines "under letters patent of the United States." (Record, pp. 17, 39.) It is not alleged that any one of the three concerns manufactured any machines which were not patented. It is further alleged that such letters patent "were letters patent applying in some cases to such shoe machines as a whole, and in other cases to attachments for, improvements upon and parts of such shoe machines." (Record, pp. 17, 39.) It is also alleged that the defendants "in addition to manufacturing, at the places aforesaid, in the quantities aforesaid, and under letters patent of the United States, as aforesaid, the several kinds of shoe machinery aforesaid, shipped the shoe machinery so manufactured by them to the shoe manufacturers aforesaid. . ." (Record, pp. 17, 39.) This clearly shows that the defendants only manufactured and shipped patented machines.

In an earlier part of the indictment, in referring to the fact that the use of shoe machines is indispensable to the manufacture of shoes in sufficient quantities, it is said that "the best of such machines have been and are manufactured

under letters patent by others [than the shoe manufacturers], as hereinafter shown, . . ." This reference, however, being to all the shoe machines made, and not to the defendants' machines alone, does not mean that only the best of the defendants' machines were patented, but means that the best shoe machines were manufactured by the defendants under letters patent, it being thereafter shown in the indictment that all of the defendants' machines were so patented, and it not being shown that any machines made by others were patented.

(*c*) For both of the foregoing reasons shoe manufacturers have for twenty-five years last past been under the necessity of obtaining shoe machinery of the kinds mentioned in the indictment principally from these defendants. This necessity existed and was as strong and compelling prior to the organization of the United Shoe Machinery Company on February 7, 1899, as since.

It is also to be noted that it is not alleged that the defendants manufactured all types of machinery used in the process of manufacturing shoes.

The court will take judicial notice of the fact that there are other processes in the manufacture of shoes than those of lasting the uppers of shoes, sewing the welt to the insole, and to the out-sole, preparing and attaching heels, and preparing and inserting metallic fastenings. The indictment does not allege that these are the only processes. It merely states that shoes are made by the "aid and use" of these machines. For example, the uppers have to be cut out and sewed together, the soles cut out and channelled, the insoles prepared, the soles and heels trimmed and burnished, etc. It therefore appears that the defendants did not manufacture all kinds of machinery used by shoe manufacturers, and it does not appear what proportion of all types of machines used for different processes, they did manufacture.

(d) The defendants, prior to the organization of the United Shoe Machinery Company, were not engaged in competition with each other.

The Consolidated & McKay Shoe Machinery Company manufactured 60% of the lasting machines; the Goodyear Shoe Machinery Company 80% of the welt-sewing and out-sole stitching machines and 10% of the lasting machines; and the McKay Shoe Machinery Company 70% of the heeling and 80% of the metallic fastening machines.

It is not alleged that there was any competition between the lasting machines manufactured by the Consolidated & McKay Company and those manufactured by the Goodyear Company, and no presumption arises that there was, but, if any such presumption could be said to exist, it would be rebutted by the other facts appearing in the indictment.

It appears from the indictment that the term "lasting machines" covered a group of different machines used for doing different parts of the work of lasting shoes. It is alleged in the indictment that "the variety of machines constituting each group [is] so great as to render it impracticable to set forth in this indictment a detailed description of each of said machines." (Record, pp. 2, 24.) In other words, all lasting machines were not competing, but different machines were used for different steps in the process. The Consolidated & McKay Company, then, was making 60% of the total of a great variety of lasting machines. It is not alleged that it was making 60% of each variety of lasting machines or that it was making all the varieties included in the group. The same is true of the Goodyear Company which made 10% of the lasting machines. It therefore does not appear that the two companies were making the same varieties of machines. The court will, furthermore, take judicial notice of the fact that shoes are of many and various kinds as, for instance, men's, women's, and children's shoes, heavy shoes, light shoes, high shoes and low shoes, rough shoes and fine shoes, and shoes made

of different materials, such as calfskin, goatskin, etc. As it is not otherwise alleged, it may well be true that machines fitted for lasting a miner's brogan would be entirely unfitted for lasting a lady's slipper. Furthermore, it is a matter of common knowledge that certain different kinds of shoes, such as welt shoes, turn shoes, McKay shoes, pegged shoes, standard screw shoes, and loose nailed shoes are of a different character, are made in different ways, and almost necessarily by the use of different machines. It therefore does not appear from any fact in the indictment that the lasting machines manufactured by the two groups were of the same character or used for the same purposes or in competition with each other.

The United States admits in many places in its brief that these companies were not competing.

Furthermore, all of these machines were patented, and the presumption, therefore, is that they did not interfere, conflict, or compete with each other. *Kokomo Fence Machine Company* v. *Kitselman*, 189 U. S. 8, 23.

Not only does it not appear from the facts alleged that the lasting machines manufactured by the two groups were competing, but the indictment nowhere charges that the machines of the two groups were in competition, or that the defendants intended to or did eliminate competition between them. Had the facts justified such a charge, it would certainly have been made. On the contrary, it does appear that the United Company continued to manufacture and market all the kinds of lasting machines which had been made by both companies prior to February 7, 1899.

Finally, the District Court distinctly found as a material fact that no competition between the groups was set out in the second count of indictment 114 (Record, p. 90), and, as it sustained the demurrers to the present counts on the same grounds on which it sustained the demurrer to the second count of indictment 114, it is clear that the District Court

held that no competition between the groups was set out in these counts. The District Court's construction of the indictment, as we have above shown, must be accepted by this court.

(*e*) All three groups of defendants manufactured their machinery and carried on their business in Massachusetts.

(*f*) While the defendants are alleged to have manufactured the larger proportion of the kinds of shoe machinery mentioned in the indictment which was manufactured in the United States, **they are not alleged to have enjoyed the larger portion, or even any considerable portion, of the interstate trade in such shoe machinery throughout** the United States.

More than half of the shoe manufacturers mentioned in the indictment are alleged to have conducted their business within the State of Massachusetts where the defendants manufactured and marketed their machinery, and presumably they would have dealt more largely with those manufacturers located near them than with those at a distance. It is not indicated how large a proportion of the shoe manufacturing business was done in Massachusetts as compared with other states, and therefore there is **nothing to indicate that the larger portion of the business of the three concerns referred to was not carried on in Massachusetts, and that other concerns conducted the larger portion of the interstate business.**

There is no allegation that there was any competition between the defendants and any other manufacturers of shoe machines. As the defendants' machines were the best of their kind and were patented, it may be that other concerns manufactured other varieties of machines.

(*g*) No defendant is alleged to have obtained or to possess any stock, ownership, or beneficial interest in the United Shoe Machinery Company. The allegation is that they transferred their stock and business to the United Shoe Machinery Company, and that Company took and held it.

There is no allegation of any exchange of stock by which the defendants became owners of any interest whatsoever in the United Shoe Machinery Company. The allegations in the indictment point only to the holding of office, presumably at the choice of the stockholders of the United Shoe Machinery Company.

(*h*) The indictment contains no allegation that the defendants agreed or bound themselves not to engage in the manufacture of shoe machinery independently of the United Company, or in any way to restrain their individual liberty with respect to the continuance of the manufacture of and the interstate trade in shoe machinery as they had before carried it on or in any other way, nor is there any allegation of any contract or agreement of any kind obligating them, or any of them, to continue in the service of the United Company.

On the contrary, the indictment alleges that the defendants can at any time withdraw their stocks and businesses from the United Shoe Machinery Company, can abolish and discontinue it, and carry on their trade without any restraint by each other.

(*i*) The indictment contains no allegation of any agreement or arrangement to fix the prices of shoe machinery produced, or to limit production, or to parcel out territory, or to control prices of shoe machinery, or to exclude others from manufacturing and marketing shoe machinery, so that, notwithstanding the allegations of the indictment every other man in the world was as free to manufacture and sell, lease or use shoe machinery after the formation of the United Company as he was before.

(*j*) It is distinctly alleged that the combination or conspiracy was formed on February 7, 1899, and that it has "at all times since said seventh day of February, in the year eighteen hundred and ninety-nine . . ." (Record, pp. 20, 42) unduly restrained trade. The change in the places of manufacture and the adoption of the alleged oppressive

provisions in the leases took place at some subsequent time.

It is not alleged that on February 7, 1899, the date when the combination or conspiracy began and from which date it is charged it restrained trade, there was any agreement among the defendants, or understanding, or that it was any part of the plan of combination to stop manufacturing at Boston and Lawrence and to manufacture at Beverly, or to cease to sell and to lease only, or to lease upon terms different from their former leases, or to adopt leases containing the provisions referred to in the indictment, and therefore these acts could not be an element of the combination or conspiracy charged.

(*k*) The indictment affirmatively alleges, not that the defendants have ceased in any degree to manufacture or to supply machinery, or to continue such interstate trade as they previously enjoyed, but, on the contrary, that they have continued to manufacture machinery, though at Beverly instead of Boston or Lawrence, and to furnish it to shoe manufacturers, though by lease instead of by sale and lease both.

(*l*) While it is alleged that prior to February 7, 1899, the defendants shipped their machines in interstate commerce under contracts of sale and lease, there is no allegation as to the extent of the business done by sales as distinguished from leases. Ninety-nine per cent. of the business may have been done by leases.

(*m*) An analysis of the allegations with respect to the leases shows that the alleged oppressive provisions did not require a shoe manufacturer leasing one or more machines from the defendants, to use all the defendants' machines exclusively, but only required him to use exclusively some other kinds of machines. How many kinds out of the great variety made by the defendants not being stated, the allegation must be taken to mean one or at most two other kinds.

Only two provisions of the leases are referred to in the indictment. The first required shoe manufacturers leasing any of the kinds of machines made by the defendants to "use in their manufacturing business only machines, of some or all of the several other kinds aforesaid, furnished to them by said defendants." This restriction clearly requires the exclusive use of certain machines, but of what machines? The phrase "of some or all of the several other kinds aforesaid" qualifies the word "machines," and thus limits the machines which the manufacturers were required to use exclusively to "some or all of the several other kinds." The use of the disjunctive "or" in this phrase restricts the requirement to "some of the several other kinds." *Commonwealth* v. *Grey*, 2 Gray, 501. Thus this provision merely means that a shoe manufacturer leasing one or more machines was required to use exclusively *some* other kinds not *all* other kinds in connection therewith. The word "some" is capable of meaning "one," and when used in a criminal indictment must be deemed to mean one, or at best two.

By the second restriction shoe manufacturers so leasing any machines were prohibited "from using any machines, of any of those kinds, furnished or offered to them by other shoe machinery manufacturers." This provision clearly prevented shoe manufacturers while they used the defendants' machines from using some kinds of machines furnished by others, but the question is what kinds? Again we find the character of the machines furnished by others which they could not use is restricted by the use of the phrase "of any of *those* kinds." This phrase "those kinds" clearly refers back to the kinds of machines last mentioned, viz., the machines which the shoe manufacturer was obliged to use *exclusively* in connection with the machines he had leased.

In other words, the first provision required the shoe manufacturer who leased any of the defendants' machines to

use exclusively some (that is one or at most two) other kinds furnished by the defendants, and the second provision states the restriction in another form, that is, it provides that such shoe manufacturer should not use machines furnished by others of the particular kind or kinds which, when he leased any of the defendants' machines, he was by the first provision required to use exclusively.

As we have shown, the variety of machines which the shoe manufacturer was required to use exclusively is not stated. Presumably he was required to use exclusively machines which were adapted for use in connection with the machine or machines he leased. Thus, if he leased a machine or machines of a single type, such as a machine used in one step of the lasting process, he would be required to use exclusively a certain variety of machines especially adapted for use in connection with such lasting machine; presumably machines used in the other steps involved in the process of lasting. These might be many or few. So if he leased one of the machines used in the process of heeling he would be required to use exclusively some other machines, presumably machines adapted for preparing the shoe for the particular heeling machine leased, or treating it in some successive step.

It is not alleged that the defendants required a manufacturer leasing a machine belonging to one group (say for example the group of lasting machines) to use in connection therewith a machine belonging to another group.

The restriction could work no hardship on any manufacturer, for the defendants furnished the best machines, and the restriction became operative only when a shoe manufacturer desired to substitute for one of the defendants' machines an inferior machine manufactured by another.

The proper way of stating the provisions in the leases would have been to set out the leases themselves, or one or more of such leases as samples. If this would have occupied too much space, in fairness to the defendants, the particular

provisions objected to should have been set out. If, as here, the Government declines to do this, and undertakes to state the restrictions in its own language and not in the language employed in the leases themselves, it should be held to a strict interpretation of the meaning of its allegations.

[We do not deem the above analysis of the provisions in the leases essential, for reasons hereafter shown, but it should always be borne in mind that the indictment does not charge (as the Government's brief contends) that shoe manufacturers were required to use the defendants' machines exclusively.]

(*n*) There is no allegation that shoe manufacturers were bound to use the defendants' machines for any specified period of time. The leases merely provided that, if the shoe manufacturer used machines furnished by others, his lease of the defendants' machines terminated. The shoe manufacturer was left free to use at any time other machines if he gave up the right to use the defendants' machines.

(*o*) The indictment does not negative, but rather lends color to the inference that defendants' machines were adapted to be used together to produce the best shoes, and indeed, being the best machines, it is obviously essential that they should be used together to obtain the best results.

(*p*) A lease of patented machines constitutes a license to use them upon the terms specified in the lease. The present leases, therefore, constituted licenses granted by the defendants under patents for the use of the machines specified, subject to the limitations or restrictions therein contained.

(*q*) The indictment does not set forth the terms upon which such machines are leased by the defendants, whether for a rental, or for a royalty depending upon the extent of use, and, it not being negatived, it is conceivable and probable that the only return the defendants derive from the

use of their leased machines is a royalty fixed by the extent to which such machines are used.

(r) It is not alleged that prices were raised or that the defendants did, by the means set out, drive any other manufacturers out of business or in point of fact increase their proportion of the shoe machinery business. There are no allegations of intimidation, or coercion, or any other unfair practices, unless the leases can be so termed.

THE MERGER OF THE THREE COMPANIES WAS NOT UNLAWFUL UNDER THE SHERMAN ACT, BUT, ON THE CONTRARY, WAS LAWFUL AND PROPER.

The merger amounted to this only. The defendants, who were engaged in manufacturing different patented machines, used in the successive steps of manufacturing a single product, viz., shoes, associated themselves together in corporate form to manufacture and market their goods. They were not in competition with each other. (The possibility of competition between the lasting machines of the Consolidated & McKay Company and the lasting machines of the Goodyear Company has already been discussed and disposed of at pages 37–39 of this brief.)

Of this combination the District Court said:—

> "It seems to be impossible to deny that the combination of various elements of machinery, all relating to the same art and the same school of manufacture for the purpose of constructing economically and systematically, and of furnishing any customer, the whole or any part of an entire system, is in strict and normal compliance with modern trade progress. . . . It is absolutely normal, and in accordance with the rightful de-

> mand of the market, for any dealer to supply mere details or an entire system of machinery, according as his customers desire." (Record, pp. 91–92.)

It must be remembered that we are now considering the indictment as construed by the District Court, and, therefore, are not concerned with the leases. Under this construction of the indictment they must be regarded as a subsequent and disconnected act, and their effect is, therefore, not pertinent to the question whether the merger itself unlawfully restrained trade.

An examination of the allegations of the indictment concerning the merger shows that there was absolutely no express agreement or arrangement to restrain trade directly, as, for instance, an agreement to restrain competition, or as to prices at which machines were to be marketed, or any agreement as to the amount of production or the territory to be served.

The Government in the absence of any such agreement is compelled to contend that the natural, necessary, and inevitable effect of the combination was unlawfully to restrain trade.

The defendants, on the other hand, contend that the indictment absolutely fails to show that the natural, necessary or inevitable result of the combination was to restrain trade; and that if by ingenuity any possible restraint of trade which might result can be suggested it would be unlikely to occur, and, if it did occur, would be an incidental restraint resulting from normal and lawful business conduct, and, therefore, not the character of restraint made unlawful by the Sherman Act.

In all the cases arising under the Sherman Act which have been heretofore considered by this court, with the exception of *Lowe* v. *Lawlor*, 208 U. S. 274, the combination complained of has been a combination of competitors or a combination formed to eliminate or restrict competition.

Lowe v. *Lawlor* involved a conspiracy to destroy all interstate commerce of a certain concern for ulterior purposes, and not incidentally as a consequence of the development of the defendant's own business, and, therefore, bears no resemblance to the present case. In the present case the combination was a combination of **non-competing** concerns, each engaged in making patented machines used in the successive steps of manufacturing a single product. We say with assurance that no combination like that presented in the case at bar has ever before been the subject of attack.

The character of the conduct condemned by the Sherman Act has been clearly stated by the court in *Standard Oil Company* v. *United States*, 221 U. S. p. 1, and *United States* v. *American Tobacco Company*, 221 U. S. p. 106. In the latter case Mr. Chief Justice White said at page 179:—

> "Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose."

In the *United States* v. *Joint Traffic Association*, 171 U. S. 505, at page 568, the court said:—

> "An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or re-

strain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited [*Hopkins* v. *United States*], that 'the act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.'"

In the same opinion, page 567, the court said:—

"Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce."

In *Anderson* v. *United States*, 171 U. S. 604, at page 616, this court said:—

"As said in *Smith* v. *Alabama*, 124 U. S. 465, 473: 'There are many cases, however, where the acknowledged power of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. . . . From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together."

Prior to the combination of the three companies each shoe manufacturer had to obtain machines of all the different types produced by the three different companies. He could not obtain from any one what the other two furnished, and therefore had to deal with all three. The defendants, on the other hand, in order to serve the shoe manufacturers, were obliged to maintain three separate organizations, involving much needless expense and resulting in less efficient service.

Furthermore, as all the machines were patented and were the best of their kind, no one of the concerns could manufacture all the machines, and thus furnish a complete system to shoe manufacturers, without combining with the other concerns and thus getting the use and benefit of the others' patents.

The Advantages and Economies of the Merger.

Under these circumstances the "normal and usual" objects and results of the merger, objects and results likely to prove beneficial to the defendants, the shoe manufacturers, and the public, appear clearly or are to be easily inferred.

The merger enabled the defendants, as the indictment shows, to give up manufacturing at Boston and Lawrence and to concentrate their manufacturing at Beverly. Thus they saved the expenses involved in operating three separate plants. They were thereby enabled to eliminate the expense of maintaining three separate factory superintendents, three distinct book-keeping departments, three distinct power, lighting, heating, and ventilating plants, and numerous other overhead charges and expenses incidental to the maintenance of separate factories, all engaged in work of the same character, and all, as then located, situated so near each other that their location brought no advantage in the way of quicker deliveries or reduced freight rates.

The merger eliminated the expense of maintaining three separate organizations of purchasing agents, and doubtless enabled the combined companies, by larger purchases of raw materials, to get better prices.

The merger unquestionably reduced the cost to the defendants of disposing of their machines. In order to keep in touch with the shoe manufacturers, it was not necessary to employ so many sales agents, or, in this case, lease agents. The cost of advertising was also doubtless reduced.

It is well known that in the case of machinery the manfacturer, in order to maintain the reputation of his machines, is required to start the machinery in operation when originally placed in the factory, to attend to repairs and replacements of defective parts, and otherwise to keep a general oversight of the machinery. It appears that the three companies, prior to the merger, leased as well as sold their machines, if in fact they did not entirely lease them. The obligation to care for and supervise machines in the hands of the shoe manufacturers would be greater where the machinery was leased than where it was sold, and indeed the presumption would be that it was a necessary and binding obligation on the part of the lessor, who still owned the machines. Where one company dealt with customers, it was able to care for the machines in their hands more effectively and more cheaply than where three concerns dealt with the same number of customers.

Where a number of machines are used for doing different parts of a specific piece of work, such as making a shoe, it is clear that the amount of work which any one machine can do is dependent upon the effective operation of the other machines. Thus the United Company, if it leased four different groups of machines instead of only one group, could, by seeing that the machines of each group were in proper condition, insure the greatest productive capacity for all their machines.

In the above, and in numerous other ways which suggest themselves, the merger would naturally and reasonably produce great economies in the manufacture of the machines, and a greater effectiveness of the machines themselves. Such economies and such effectiveness of the machines would not only normally result to the advantage of the manufacturer of the machines, but by reason of the power to reduce prices in consequence thereof, and by reason of the greater efficiency of the machines themselves, be of advantage to the shoe manufacturers and to the public generally.

There are many homely illustrations of the combination of businesses for similar normal and lawful purposes which clearly do not violate the Sherman Act.

Take, for instance, dealers in butter, cheese, and eggs, which market tradition seems to recognize should be sold together. If a dealer in butter, a dealer in cheese, and a dealer in eggs in the city of Washington who supply customers in Virginia and Maryland unite their businesses so that they may thereby have an increased capacity to serve the trade and an increased efficiency in marketing their goods, have they violated the law?

Take the modern department store dealing in all varieties of goods which a customer may desire, and which is the natural and legitimate result of competitive conditions because it is economical, efficient, and appeals to the customer. Would such a department store formed by the merger of different persons previously engaged in supplying the different elements in which the new department store deals be unlawful?

Take a furniture dealer, a carpet dealer, and a dealer in kitchen utensils. They wish to unite their businesses so as to be able to furnish a complete line of household goods, and thereby successfully compete with other individual dealers for a larger portion of the trade. Their goods are naturally sold together, and their combination would be a

result of the realization of the fact that the man who is desirous of purchasing goods of one kind is likely to wish to purchase also the other kinds, and that the greater facility of opportunity furnished by the combination to such a customer will result in a greater volume of trade. Would the combination of their businesses be illegal?

A printer and a book-binder maintain separate establishments. Is it unlawful for them to unite their businesses and furnish the complete book to customers?

Three lines of steamboats operate, the first from Norfolk, Virginia, to New York, the second from New York to Boston, and the third from Boston to Portland, each being controlled by separate individuals. Is it unlawful for the three to unite and operate a through line?

If it were now the fact, as it was not many years ago, that one line of railroad operated from Washington to Baltimore, another from Baltimore to Philadelphia, and a third from Philadelphia to New York, would the Sherman law prohibit the combination of these three roads into one through line?

If each of the separate dealers or companies which so combined had a dominating control of its own trade, it might be contended, if the circumstances justified, that each, before the combination, had an unlawful monopoly of its particular business or unlawfully restrained trade in such business, and that the combination, therefore, continued the unlawful monopoly or restraint which obtained in its constituent parts, and was, therefore, itself unlawful. But if each dealer or concern prior to the combination, as in the present case, was conducting its business lawfully, the combination of such lawful and non-competing businesses would not be unlawful as we shall more fully show later, and furthermore, if the business of each of such dealers or concerns was entirely based upon and protected by letters patent as in the present case, there would be a

special justification for the combination which would not exist in any of the above illustrations.

The Merger did not produce, was not designed to produce, and its Natural or Necessary Effect was not to produce any restraint of Trade.

We may now inquire if the merger contemplated produced or resulted in any restraint of trade.

The three groups of defendants were not competing, so that no elimination of competition resulted.

The defendants are not charged with placing any restraint on their personal conduct. Each was free to engage individually or with others in the manufacture of shoe machinery to any extent he saw fit. They did not covenant not to engage in business in competition with the new corporation, or to aid it to suppress competition, or to keep out of its territory, or to leave its customers alone. The only change as respects each group of defendants was that they had transferred the business and patents which they controlled to a new corporation, in which others were interested. If this is a restraint of their conduct, it would be a restraint for any one engaged in business to admit new partners, or, if he owned a majority of the shares of a corporation which conducted that business, to make a sale of a portion of his shares.

The merger placed no restraint upon the business previously carried on by the three groups of defendants. It is not alleged that any change in the volume or character of the business resulted or was proposed. The only change effected by the merger was that the business of each group no longer formed the sole business carried on by its owners, but thereafter formed a part of such business, and that there were six owners or persons in control instead of three or less, as previously. The fact that the business of each group became a portion only of a more extended

business (the balance of the business which was acquired from the other groups being in non-competing machines) did not tend to restrain it in any way. That the number of those in control was increased was no more a restraint of trade than would be the admission of new partners to any existing business.

The merger did not restrain the shoe manufacturers. The only change was that shoe manufacturers bought or could buy all the groups of machines from one manufacturer instead of buying the different groups of machines from three different manufacturers. The resulting economy would tend to promote their trade rather than restrain it. The shoe manufacturers were not, after the merger, obliged to deal with the defendants in any other respect differently from the manner in which they had previously dealt with them, unless the defendants imposed some definite new restraint not contemplated at the time, and not in any wise reasonably or necessarily resulting from the merger, and therefore not pertinent to our present inquiry. They remained as free as ever to acquire machines from other manufacturers.

The merger did not restrain or exclude other shoe machinery manufacturers from doing business. Such others could still sell their machines as free from any undue restraint as previously. The only way in which they were affected by the merger was that the better care and supervision of the defendants' machines which was made possible by the merger, and the economies which it permitted, made or tended to make the defendants' machines more desirable and cheaper than previously, and, therefore, tended to make it more difficult for other shoe machinery manufacturers to compete with them. This, of course, was an entirely legitimate and proper result.

The merger did not tend to increase prices. There was no agreement by the defendants to increase prices, and it is not alleged that prices were increased. There is no reason shown why the merger should result in higher prices

than previously, and in fact the economies resulting from the merger would tend to lower prices.

The above being the facts, the Government in its search for some possible restraint of trade has been forced to contend that a restraint of trade resulted because the merger "enormously curtailed the customers' liberty of action, not by eliminating competition between the groups, for they were non-competitive, but by compelling the customer to deal with one and the same group as to all four classes of machinery, whereas formerly he could deal with four separate groups" (Government Brief, p. 30).

The result, according to the government's contention, is as follows: "Formerly, a disagreement with the chief manufacturer of one machine affected only that one element in the business, and left one free to go to an independent manufacturer for that one element; but now one such a disagreement meant a disagreement with the controlling manufacturer of every class of machine used in the shoe business" (Government Brief, p. 30).

We have shown above that it is not alleged that the defendants made every class of machine used in the shoe business, but on the contrary that they made only four of the different classes of machines so used. But apart from this if no such result as that suggested by the government followed from a disagreement, the customer would be no worse off than he would have been if there had been no merger.

The government does not explain what it means by a "disagreement," and its meaning is not clear. Two kinds of disagreement are conceivable. First, where the customer disagreed as to the character, quality, or price to be paid for a particular kind of machine, but, if such disagreement were irreconcilable, it is not alleged, and it does not follow as a natural consequence. that the defendants doing business as the United Shoe Machinery Company would refuse to lease machines of other kinds, which they made, to such a

customer. It is not alleged that the organization of the company contemplated any such course, and to argue that such would be the natural and inevitable result is a complete *non-sequitur* and seems absurd. Second, the Government may contend that "disagreement" means a personal difference, as a result of which each or both of the parties come to distrust and dislike the other, and as a consequence refuse to do business with the other. A disagreement of this kind would not be a natural and inevitable result of the merger. It cannot be seriously contended that the defendants contemplated disagreements of this character. Such a disagreement would arise from entirely different causes, and cannot be said to be the logical and inevitable outcome of the merger.

The charts upon which a large part of the government's argument is based show no reduction in the number of separate and independent manufacturers of competing machines. Thus, if there were three separate concerns making heeling machines before the merger, there remained three separate concerns making the same machines after the merger.

The false assumption made by the government in treating the so-called independents as if they had combined and were but one is too obvious to need discussion, but this false assumption that the independents are to be treated as one destroys the truth of the result (immaterial though it be) which the government contends the charts show. The mathematical reduction of the opportunities to trade of the shoe manufacturer from twenty-four to two is rudely disturbed by the single reflection that there are upon the theory of the Government just as many independent shoe machinery manufacturers as before; that, so far as appears, they have not combined among themselves, and that they present numerous opportunities for a customer to bargain or to "disagree." Indeed, if we adopt the method of reasoning used against us by the government and treat

the defendants as one, then the number of concerns with which the shoe manufacturer had the opportunity to deal or have "disagreements" remained exactly the same after the combination as they did before.

Government's Contention that the Size of the Business made it Unlawful is not Justified.

The government seems to realize the weakness of its contention that shoe manufacturers are unduly restrained by being compelled to deal with one group for three classes of non-competing machines instead of with three groups, each making one of the classes of machines. Thus they concede that no unlawful restraint would have resulted if the combined groups had taken over "only a reasonable proportion of the total trade." "If," the government says, "a corporation (formed by the consolidation of several companies, each owning a different class of machinery) made every class of machinery (but its total control was only (say) 25 per cent. of the total trade) it would doubtless be a normal trade development" (Government Brief, p. 33).

If three non-competing companies, each controlling 25 per cent. of its particular business, can lawfully be combined, and their combination would constitute a normal trade development, we fail to see why they cannot equally be combined if each controls 70 per cent. of its particular business. The reasons for combining would be the same in each case, viz., the ability to furnish the whole of an entire system of machinery, the saving of an unnecessary duplication of expenses, and the better service which could be furnished customers. The probability of a disagreement with customers, if it can be regarded as a possible restraint of trade, would not more naturally or necessarily occur, nor, if it did occur, would its consequences appear to be seriously increased.

It should be noted that the defendants are alleged to have manufactured certain percentages of the machines manufactured in the United States, but that it does not appear that they enjoyed the larger portion or even any considerable portion of the interstate trade in shoe machinery. Their business may have been mainly confined to Massachusetts, where their factories were located, and where a large number of the shoe manufacturers had their factories (see our brief, p. 39). Thus the government's admission that if the defendants had controlled only 25% of the trade in each class of machinery their combination would have been legal, is conclusive in our favor as it does not appear that they did control more than this percentage of interstate trade.

It should be further noted, as we have shown at page 36 of our brief, that the defendants are not alleged to have controlled or manufactured all types of machines used in shoe manufacturing, but only the machines used in four processes.

Furthermore, if in the case of unpatented articles the mere size of the business was relevant in determining whether or not it was lawful or unlawful under the Sherman Act (which we submit cannot be true unless some illegal, oppressive or abnormal acts directed towards obtaining or maintaining such business are shown), this could not be true of a business or of a combination of businesses dealing entirely with patented articles.

The normal development and character of manufacturing businesses based on patents require special consideration in determining whether the Sherman Act is applicable to a combination of such businesses.

Practically all the cases heretofore considered by this court in which it has had occasion to construe the Sherman Anti-trust Law and to apply its provisions to alleged com-

binations or conspiracies in restraint of trade have related to transportation companies or to manufacturing or trading organizations which dealt with staple commodities as to which a lawful monopoly is practically impossible. There has been no case before this court in which the entire business was based on and controlled by patents.

The case of *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, in which there was a combination of a large number of competing manufacturers who had made agreements of the most comprehensive and binding character, which resulted in the fixing of prices, the restraint of trade, and the stifling of competition, and who sought to justify such action by a license under a patent not on the things manufactured and sold, but on a mere tool not necessary to such manufacture, and in any event employed only as a convenience in one portion thereof, is the only case in which any question as to the bearing of patents on the legality of a combination has come before this court.

In the present case, however, the businesses of the three groups which were merged in 1899 was not only non-competing, but also such businesses and likewise the business of the United Shoe Machinery Company into which they were merged was based entirely upon patents. The indictment avers that not only the "best" machines of the shoe machinery art, but, as we have shown above (see our brief, pp. 35–36), all the machines manufactured by the three groups and by the United Shoe Machinery Company were covered by patents.

While this consideration does not necessarily require the revision of any of the views of this court as to the scope and meaning of the Anti-trust Law, it becomes of vital importance that the doctrines established in the reported cases should be applied with full recognition of the important and far-reaching differences which distinguish and characterize a manufacturing business based on patents from one that deals only with staple articles of commerce.

It is the essence of a business carried on under patents that it should be a monopoly. By the very terms of the grant of a patent, trade is restrained, competition eliminated, and monopoly established, for the exclusive right to make, use, and sell for a limited term is vested in the patentee and his assignees. In accordance with the policy of the Constitution and of the law from the beginning, one who owns a patent may or may not make, use, or sell under it or authorize others so to do. As far as any questions of restraint of trade, elimination of competition, and establishment of monopoly are concerned, he has the absolute power to control the extent to which and methods by which the inventions of the patent shall be utilized; and, as we shall hereafter show, to authorize the manufacture, use, or sale of a patented invention with such limitations or restrictions, large or small, as he may determine upon.

No one has the right to compete with him in the manufacture of his patented machines. If the inventions of his patent are of such a character that under them he makes the "best" machines in the market, as the indictment charges to be the case with the defendants throughout their manufacture both prior and subsequent to February 7, 1899, he is able to secure, in accordance with the ordinary laws of supply and demand, practically a complete monopoly of the machines in the art. If he fails in this, it is only because his terms are so high or the conditions upon which he markets his machines are so onerous that a field is open to inferior machines which the patentee could thoroughly cover by a reduction in cost or the grant of more favorable terms to the consumer.

Under the allegations of the indictment it was inevitable that the three groups which came together February 7, 1899, should have the 60 per cent. or 70 per cent. or 80 per cent. of the entire business of the country which, according to the indictment, they did have. The size of the business of those three groups, in view of the fact that they were

working under patents, is no foundation whatever for any contention or suspicion that their monopoly of the business, to the extent to which they had a monopoly, was unlawful, and no charge is made in the indictment that the business of either of the three groups was tainted by unlawful monopoly.

When these three groups, each doing the greater part of the business in the country in machines of the type manufactured by it, but neither competing with the others, came together, the United Shoe Machinery Company carried on the business of the three groups without change, for it controlled all the patents formerly controlled by the three groups.

The court will certainly assume that the United Company has continuously taken out new patents for improvements in the four classes of machines referred to in the indictment. As is well known, inventing at the present time is carried on by all large manufacturing concerns which work under patents in a scientific fashion. The needs of the users of machines and of the public are carefully studied. Elaborate laboratories are maintained to develop all improvements, large or small, that will add to efficiency or to economy in the use of the machines and any invention that is made outside of the organization of the company is eagerly acquired, if it has in it any elements that tend toward the perfection of the machinery. It is not strange therefore that the defendants, working through the United Company, secured, as is charged in the indictment, the same proportion of the aggregate business in each class of machinery which the several groups held prior to the merger, nor would it have been surprising if it were found that the United Company in the course of time had acquired a still larger proportion.

Furthermore, the only way in which either of the three groups existing prior to February 7, 1899, could lawfully and as a practical matter have undertaken the manufacture

of the machines made by either or both of the other groups was by agreement or combination among themselves. If either had undertaken such manufacture without agreement, it would have been obliged, under the showing of the indictment, to have unlawfully infringed patents outright or to have made inferior machines, for which there would have been no legitimate market and which, if used, would surely have resulted in deterioration and want of economy in the manufacture of shoes.

In other words, while the government concedes it is a normal trade development for one concern to manufacture an entire system of machines adapted to the same purpose, it would refuse to permit this result to be accomplished in such a case as the present case in the only way in which it could be accomplished, namely, by placing in one company all the patents covering the different machines, and this because those patents produced such useful machines that their owners had obtained 60 to 80 per cent. of the business of making machines of that character.

Because of the patent consideration, the size of the business of each of the combining groups is legally, from the point of view of public policy, a matter of no consequence. The business was large in each case because of the lawful monopoly conferred by the patents.

The combination, or merger, of February 7, 1899, is no more reprehensible because of the size of the monopoly lawfully enjoyed by each group or the size of the monopoly enjoyed by the combined groups than would be a combination of those who manufacture and deal in staple articles if each, and the combination itself, controlled a very small percentage of the business.

The fact that three concerns which were combined on February 7, 1899, did from 60 per cent. to 80 per cent. of the business in their respective machines, because they held patents for the best machines, and could thus lawfully exclude all others from manufacturing them, in the very nat-

ure of things rebuts any suspicion or suggestion of illegality which could conceivably arise because of the size of the business thereby established and maintained. It was inevitable that such business should be of large size in each and all of the groups of machines referred to in the indictment, as their manufacture was a lawful monopoly protected by the grant of letters patent, to the maintenance of which, as Judge Marshall said in *Grant* v. *Raymond*, 6 Peters, 218, 242, "the public faith is pledged."

And, because each of the three concerns had such a lawful monopoly over its own machines and could at its own pleasure exclude each of the other concerns from manufacturing such machines, the three concerns were fully justified in combining in order to produce, market, and keep in repair in an efficient and economical manner a complete line of all the machines.

In *United States* v. *Am. Bell Tel. Co.*, 167 U. S. 224, Mr. Justice Brewer, referring to an alleged extension of the telephone monopoly, said (p. 249):—

> "Suppose that at the expiration of this Berliner patent some new invention shall be made by which in connection with those already free to the public an instrument can be manufactured far surpassing in utility that used to-day and the Bell Company shall purchase that invention, the public, which always insists on having the best and most serviceable, will undoubtedly take the new instrument, and in that way it may happen that what is called the telephone monopoly is practically still further continued. But surely that does not abridge the legal rights of anyone. The inventor of the latest addition is entitled to full protection, and if the telephone company buys that invention it is entitled to all the rights which the inventor had."

Would it have made any difference in the court's opinion if the Bell Telephone Company, which owned the Berliner

patent, had acquired a patent for a switchboard or for a signalling device to be used in connection with the telephone? That is, if, instead of extending its monopoly of the telephone for a longer time by the acquisition of an additional patent on the telephone, it had extended its monopoly into another non-competing but allied field by the acquisition of a lawful patent covering some article in that field? and, if not, would it have made any difference if, instead of purchasing the patent outright, it had merged its business with that of the owner of the patent or had issued stock in payment for the patent?

We have shown above (*supra*, pp. 25–29) that in charging a crime under the Sherman Act general allegations of intent to restrain trade or monopolize, or to do other acts which may or may not constitute an offence according to the attendant circumstances or means used, import no illegality, unless the unlawful means to be used, or the attendant circumstances which make the acts an undue restraint or monopoly are specified fully.

If such general allegations, however, can in any case have the further effect of showing an illegal object or end, then in considering whether such effect can be given them in any particular case, the subject-matter of the trade or industry concerned is of vital consequence. Very much the greater part of all manufacture and commerce relates to staple articles which any one may make or sell. An intent to monopolize such articles or to obtain a dominating control over them might conceivably in and by itself be held unlawful. All products of the soil, and all ordinary articles of commerce like fabrics, wall paper, furniture, drain pipes, and other similar articles are of this character.

If, however, a concern manufactures some radically new article which has never before been made, it would hardly seem that an intent on its part to monopolize the manufacture of that article so far as possible, that is to

say, so to conduct its business that others would not find it for their interest to compete, would be reprehensible unless unlawful means were to be employed.

So in the case of patented goods an intent to restrain trade, to eliminate competition, and to monopolize the market in these goods means merely a recognition of the right of the patent owner therein and certainly cannot be open to criticism. The patent gives the exclusive right to make, use, and sell, that is,—the right to restrain and prevent all others from dealing in any way with the patented articles.

In the case at bar the indictment states in substance that there were patents which gave to each of the three groups of defendants who combined in 1899 the exclusive right to make, use, and sell all the shoe machinery which they respectively manufactured, and the combined group had the same right after 1899 as to all such classes of machinery. An intent on the part of the defendants to restrain trade in such machinery, to enhance its prices, or to prevent competition in it means nothing except an attempt to exercise the rights given by the patents.

It seems clear, therefore, that in the present case general allegations of intent to monopolize or restrain trade, to obtain the business of such machines, or enhance its prices are absolutely irrelevant and immaterial and add nothing to the facts stated in the indictment. Only specific averments of intent to employ unlawful means can, in a case like the present, be under any circumstances material. There are no such averments in the present indictment, for although general vituperative language is employed it amounts only to the allegation that the defendants agreed to merge their business interests and their patents to secure that control which their patents in and of themselves conferred upon them and no greater control.

The Merger was not Illegal

1st. Because no Greater Power to restrain Trade is charged to have resulted, and

2nd. Because no Restraint of Trade is the necessary, natural, and inevitable Consequence of the Merger.

It cannot be contended in the present case that, while the merger did not restrain trade, yet it was illegal because it gave the defendants in some way a greater power and control over the shoe machinery business, which power and control they might conceivably use for restraining trade, an illustration of the way in which it might be used being furnished by the subsequent adoption of the leases. The District Court has found that the indictment does not charge that such power and control, if any such resulted from the merger, was acquired with the purpose or intent that it should be employed to adopt the leases or to enforce any unfair practices of any kind or to do any other acts except to continue the business previously carried on by the three concerns in the same way in which it had been previously carried on. The merger was formed, according to the indictment as construed by the District Court, only to enable the defendants to furnish a complete system of shoe machinery, with its resulting economies and increased efficiency. If it can be contended that the indictment charges the defendants with an intent to extend their patent monopolies, and thereby to enhance prices, etc., it is nevertheless true that the indictment expressly alleges that the offence consisted solely of the merger of the three companies, which, it is charged, was the sole restraint of trade. No intention to do any other acts or to use the merger or combined companies as a means for a further restraint is alleged.

It is difficult to see just what additional power to restrain trade or oppress others the defendants acquired by the merger. The only power seriously suggested by the gov-

ernment was the power to refuse to sell one class of machines, if the purchaser would not take others. We shall show below, in discussing the leases, that the exercise of this power would be lawful and proper. But did this power result from the merger? The three concerns, prior to the merger, if they had deemed it to their mutual advantage, had the power by agreement among themselves to require that shoe manufacturers using the patented machines of one should use the patented machines of all. It does not appear how this power was increased by the merger. The adoption of any such policy after the merger as well as before required the mutual agreement of the defendants and a new and definite act.

But, assuming that some additional power resulted from the merger, it is clear that the mere acquisition of a power incidentally resulting from the pursuance of a normal and natural trade policy cannot be illegal, because it conceivably might be used to restrain trade. The acquisition of such a power so acquired would have too remote a connection with its oppressive use to constitute a restraint of trade or give rise to any dangerous probability that a restraint of trade would result.

Swift & Co. v. *U. S.*, 196 U. S. 375.
Commonwealth v. *Peaslee*, 177 Mass. 267.

In *United States* v. *St. Louis Terminal*, 224 U. S. 383, relied on by the government, the facts were quite different. The Terminal Company owned by the defendant railroads was a combination of three competing terminals. Furthermore, the geographical situation was such that no other competing terminal was possible. And, finally, the enormous power so given the defendant railroads was improperly exercised. "The terminal properties in question are [were] not so controlled and managed, in view of the inherent local conditions as to escape condemnation as a restraint

upon commerce" (p. 406). In the case at bar there was no combination of competitors, there was no inherent power to prevent others from competing (except so far as the patents grant the power to exclude others from infringing, a lawful power granted for the express purpose of accomplishing this result), and under the indictment as construed by the District Court there was no improper exercise of any power obtained by the merger, if any such power existed.

In *United States* v. *Union Pacific R.R. Co.*, 226 U. S. 61, also relied on by the government, there was a combination of two railroads engaged in active competition in respect to a large volume of trade. The combination, therefore, deprived the two companies of the inducement to compete. "It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint" (p. 88). In the case at bar there was no competition between the combined companies, and, therefore, no such necessary tendency to restrain trade.

In *United States* v. *Reading Company*, decided December 16, 1912, likewise relied on by the government, the Temple Iron Company was acquired by a combination of railroads for the purpose of and with the result of throttling a proposed competing railroad and of preventing other similar attempts to compete. The mere fact that it had accomplished its purpose of preventing the construction of the proposed railroad did not make it thereafter legal. It remained "a powerful agency by means of which the unlawful purpose which induced its acquisition may be continued," and there was evidence that it was intended the power should be so exercised. But, even apart from any further exercise of power, its mere continuance secured one of its original purposes, for it "removed the temptation for like competition by securing to themselves [the defendants]

forever the product of the collieries named." In the Reading case, therefore, we have not only a combination originally unlawful, but a combination whose power it was intended should be further exercised unlawfully, and whose mere continuance secured one of its unlawful purposes.

If any Restraint of Trade could result from the Merger, it would be purely Incidental to the Accomplishment of a Lawful Purpose.

We submit that in the case at bar it does not appear that it was intended that any restraint of trade should result, or that any restraint of trade resulted or was likely to result, from the merger of the three companies, and that the government's suggested restraint of trade is a mere possible inconvenience, trivial in character, not contemplated by the defendants, unlikely to arise, and, if it did arise, at the utmost amounting to an incidental restraint arising from a lawful transaction. Such incidental restraint, if it arose, would not make the combination illegal.

In *Bigelow* v. *Calumet & Hecla Mining Company*, 167 Fed. 721, at page 725, Mr. Justice Lurton, then circuit judge, in rendering the opinion of the Court of Appeals, said:—

> . . . "In *Hopkins* v. *United States*, 171 U. S. 578, 594, 600, 19 Sup. Ct. 40, 45, 46, 43 L. Ed. 290, Mr. Justice Peckham emphasizes this obvious limitation when, speaking for the court, he said:
>
> > 'There must be some direct and immediate effect upon interstate commerce in order to come within the act.'
>
> "The same discriminating justice then adds:
>
> > 'An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the inter-

ference produced by the agreement or by the legislation would not be direct. . . . The act must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly restrain it.'

"This limitation of the act to those contracts and combinations which directly and immediately or necessarily affect commerce among the states is recognized in a long series of opinions. Among them are: *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Addystone Pipe Co.* v. *United States*, 175 U. S. 211, 242, 20 Sup. Ct. 96, 44 L. Ed. 136; *Montague & Co.* v. *Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679; *Loewe* v. *Lawlor*, 208 U. S. 274, 297, 28 Sup. Ct. 301, 52 L. Ed. 488. The *Knight* case, in its last analysis, is but a striking illustration of the rule that the monopoly or agreement to come within the act must directly and immediately affect interstate commerce. Confining the case to its facts, it establishes the proposition that a mere combination between manufacturers only, by which a monopoly of a product results, is not, without other special circumstances, sufficient to justify an active intervention under the act to undo a contract by which such monopoly has been brought about. That the product thus monopolized by such combination of mere manufacturers may ultimately find itself into the stream of interstate commerce is there held not to be such a special circumstance as to constitute the direct and immediate effect upon commerce among the states as to bring the agreement within the act. Subsequent cases have been distinguished from it, but it has never been overruled."

The court further says at page 731:—

. . . "No express agreement is shown by which anything is to be done or left undone from which an unlawful restraint must, or will, probably happen. The case

differs from all of the cases appealed to by the learned counsel for appellants in this important particular."

The court further adds at page 732:—

"In *Cincinnati, P. B. S. & P. Packet Co.* v. *Bay*, 200 U. S. 179, 184, 26 Sup. Ct. 208, 209, 50 L. Ed. 428, it is cogently said, in respect to the question as to whether a particular combination or agreement will operate to produce an unlawful result under the anti-trust law, that 'a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.'"

See, also, *Anderson* v. *United States*, 171 U. S. 604, at page 615, where Mr. Justice Peckham says:—

. . . "Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object."

In *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, at page 623 Mr. Justice Day says:—

. . . "In this day of multiplied means of intercourse between the States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation.

"The attempt to invoke the provisions of the Sherman Act in this case is equally unavailing. That act has been recently considered in the *Northern Securities* cases, decided at this term, and its construction and the nature of the remedies under it determined. It is not intended to affect contracts which have a remote and indirect bearing upon commerce between the States. *Hopkins* v. *United States*, 171 U. S. 578; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211."

That the soundness of this proposition remains undisputed is shown by the following quotation from Mr. Chief Justice White's opinion in *Standard Oil Co.* v. *United States*, 221 U. S. 1, at page 66:—

. . . "And, referring in the *Hopkins case* to the broad claim made as to the rule of interpretation announced in the *Freight Association* case, it was said (p. 592):

'To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act.'

And in the *Joint Traffic case* this statement was expressly reiterated and approved and illustrated by example; like limitation on the general language used in *Freight Association* and *Joint Traffic cases* is also the clear result of *Bement* v. *National Harrow Co.*, 186 U. S. 70, 92, and especially of *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179."

We confidently assert that never before has the legality of a combination of this character been attacked, and that this court has never intimated that such a combination was unlawful, but, on the contrary, has declared that the Sherman Act was not designed to interfere with ordinary business agreements or combinations such as the present.

Thus in *United States* v. *Joint Traffic Association*, supra, Mr. Justice Peckham said (pp. 567, 568):—

"Nevertheless we might say that the formation of corporations for business or manufacturing purposes, has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce."

And the court added:—

"To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

We respectfully submit that a combination of the character charged in this indictment, standing by itself (and not alleged to be a part of or a step in a more general plan or scheme) is clearly not condemned by the Sherman Act.

CONCENTRATION OF MANUFACTURING AT BEVERLY CONSTITUTED NO RESTRAINT OF TRADE.

In addition to the allegations as to the merger of the three companies and the adoption of the leases, only one other allegation is made of any acts done or contemplated by the defendants. It is alleged that the defendants "ceased to manufacture any of such shoe machinery at Boston or Lawrence aforesaid, and have manufactured all of the same at Beverly" (Record, pp. 21, 43). In an earlier

part of the indictment it was alleged that at the time of the merger one of the three companies which were merged manufactured at Beverly, one at Boston, and one at Lawrence and Winchester. It may be noted that this concentration of manufacture like the adoption of the leases, is alleged to have taken place at some indefinite time subsequent to the merger, and that, like the adoption of the leases, it is not alleged as contemplated at the time of the merger on February 7, 1899.

We are at a loss to understand how this allegation that the manufacture was concentrated at Beverly is material or why it was inserted in the indictment. It imports no limitation of production or restraint of trade. On the contrary, it suggests a lawful purpose of the combination, namely, the saving effected by bringing the entire manufacture under one roof.

THE LEASES MADE BY THE DEFENDANTS WERE CLEARLY LAWFUL, WHETHER CONSIDERED SEPARATELY OR IN CONNECTION WITH THE MERGER.

We have shown above that the District Court held that the indictment, properly construed, did not charge the leases as forming a part of the combination or conspiracy. We have also shown that not only was this construction of the indictment right, but that, right or wrong, it must be accepted by this court, and that therefore no question as to the lawfulness or effect of the leases is presented to this court.

While insisting absolutely upon this proposition, nevertheless, as a large portion of the government's brief consists of an attack upon the legality of the leases, we propose to show that they were clearly lawful.

Nature of the Restrictions contained in the Leases.

We again remind the court that, contrary to assertions in the brief of the Government, the indictment does not charge that by the terms of the leases, all defendants' machines must be used if one was used. The "tying," as charged, is only to the extent that, if a machine is leased "some or all" of defendants' other machines must be used, meaning one or at the most two others, and, as we have shown, presumably of the same group. There is no burden on the defendants to establish that they might lawfully insist that if *one* of their machines was used, *all* their others must be used. If the scope of such an extensive restriction were material in determining its lawful or unlawful character, the indictment does not state the facts necessary to bring the defendants within any rule of law based upon an extensive scope as compared with a narrow range of such restrictions. It seems clear, however, that if the character of the restrictions was such as the Government wrongly assumes in its brief, there would be nothing unlawful in the leases, considered either by themselves or in connection with the merger.

We further wish to point out that:—

Shoe manufacturers were not bound to use the defendants' machines for any specified period of time. The leases merely provided that, if the shoe manufacturer used machines furnished by others in violation of the terms of the lease, his lease of the defendants' machines terminated. **The shoe manufacturer was left free to use at any time other machines if he gave up using the defendants' machines.**

The leased machines and all other machines required to be used in connection therewith were the property of the defendants. The defendants, therefore, merely restricted

the use of their own property. They did not restrict the future right to use machines which they sold.

A lease of patented machines constitutes a license to use them upon the terms specified in the lease. **In other words, the present leases constituted licenses granted by the defendants under patents for a restricted or limited use of the machines specified therein; that is, a use only in connection with another machine or other machines owned by the defendants.** If the licensees made an unauthorized use of the machines, that is, used them in connection with machines furnished by others, their licenses could be terminated. If, therefore, patentees are authorized to impose such restrictions upon patented machines owned by them, the leases in the present case were lawful.

We submit, however, that these restrictions were not only lawful, as conditions or restrictions imposed by patentees upon the use of patented articles, but that they would also have been lawful if imposed upon the use of unpatented articles owned by the defendants.

We shall first, however, consider them as restrictions on the use of patented articles.

The General Rule is that Conditions or Restrictions Imposed by Patentees are lawful unless they are in their very Nature Illegal.

In *Bement* v. *National Harrow Company*, 186 U. S. 70, this court laid down the following broad general rule with reference to conditions imposed by patentees:—

> "Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and **the rule is with few exceptions that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the**

licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contract keep up the monopoly or fix prices does not render them illegal." (Blackletter ours.)

Considerations of Public Policy not Recognized in the Patent Law are not relevant with Regard to Such Conditions or Restrictions.

The rule permitting patentees to impose such conditions or restrictions as they please, provided only they are not definitely illegal, is a necessary part of and is included in the exclusive right granted by the patent. As the patentee has the absolute right to exclude all others from any use, he necessarily must have the right to grant only a limited or restricted right of use, or a right to use only under such conditions as he pleases. As said by this court in *Henry* v. *Dick Co.*, 224 U. S. 1 (p. 35),—

> "This larger right [viz., the right of excluding all and refraining from use himself] embraces the lesser of permitting others to use upon such terms as the patentee chooses to prescribe."

The patentee's right, then, to impose restrictions, being a right granted him by the patent law, cannot be abrogated without infringing upon the rights of property granted by that law. So long as that law remains in force, the court cannot consider the legality of such restrictions in the light of public policy. Public policy in respect to them is established by the act of Congress.

As said by this court in *Henry* v. *Dick Co.*, supra (to repeat and add to the citation above made),—

> "This larger right [viz., the right of excluding all others and of refraining from use himself] embraces the lesser of permitting others to use upon such terms

as the patentee chooses to prescribe. It must not be forgotten that we are dealing with a constitutional and statutory monopoly. An attack upon the rights under a patent because it secures a monopoly to make, to sell and to use, is an attack upon the whole patent system. We are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor's exclusive right of use. And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries requires to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands it contains none, and the duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial."

Not only then is the patentee's right to impose restrictions included in the broader grant of rights to which his patent entitles him, and to the maintenance of which, to use Chief Justice Marshall's words below quoted, "the public faith is pledged," but, being a portion of those rights, it should be regarded and construed in the same liberal spirit in which a patentee's other rights are regarded and construed.

Mr. Justice Story in *Ames* v. *Howard*, 1 Sumner, 482, 485, said:—

"Patents for inventions are not to be treated as mere monopolies odious in the eyes of the law, and therefore not to be favored; nor are they to be construed with the utmost rigor, as *strictissimi juris*. The Constitution of the United States in giving authority to Congress to grant such patents for a limited period declares the object to be to promote the progress of science and useful arts, an object as truly national and meritorious and well founded in public policy as any

which can possibly be within the scope of national protection. Hence it has always been the course of the American Courts (and it has latterly become that of the English Courts also) to construe these patents fairly and liberally and not to subject them to any over-nice and critical refinements."

In *Henry* v. *Dick Co.*, 224 U. S. 1, this court said (in speaking of the patent law):—

"It is a statute creating and protecting a monopoly. It is a true monopoly, one having its origin in the ultimate authority, the Constitution. . . . In *Bement* v. *National Harrow Co.*, 186 U. S. 70, 89, 90, 91 and 92, this court quoted with approval the language of Chief Justice Marshall in *Grant* v. *Raymond*, 6 Peters, 218, 241. Concerning the favorable view which the law takes as to the protection extended to the exclusive right, the court, through Chief Justice Marshall, said:—

'It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made, and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield, it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged.'"

Furthermore, even if the patentee's right to impose restrictions upon the use of his invention were not a right directly granted by the patent law, and therefore the court

were at liberty to take into consideration questions of public policy with reference thereto, such restrictions should, nevertheless, be viewed with favor by the courts in order to carry out the manifest purpose and policy of the patent law. Congress, in granting a patentee exclusive rights for seventeen years, did so to enable the patentee to obtain as large a financial return as possible. It offered this opportunity "to promote the progress of science and the useful arts" by encouraging invention. Congress might have restricted the patentee's profits by providing, as has been done in some other countries, that the patentee should permit the use of his invention by others on reasonable terms. But it declined so to do, and on the contrary adopted the policy of permitting the patentee to obtain as much return as he could, either by granting licenses or by using the patented invention himself exclusively, or, if he deemed it to his best interest, by not using at all (*Paper Bag Patent Case*, 210 U. S. 405). If, therefore, the patentee finds that his best return is obtained by granting restricted rather than complete licenses, it is clearly in accord with the policy of the patent law that he should be permitted to do so freely, and should be prohibited only when his conditions or restrictions are clearly and definitely illegal.

Furthermore, as the patentee can exclude all others from the use of his invention and use it exclusively himself, it is to the benefit of the public to induce him to permit others to enjoy the benefits of his invention, even if only to a limited extent. If, therefore, he is unwilling to grant others his full rights, he should be encouraged to grant them limited rights by being allowed to impose conditions or restrictions on the rights he grants. Public policy must favor conditions which give the public rights which might otherwise be denied them.

Restrictions which merely require Licensees to use Patented Articles in a Manner in which the Patentee himself might lawfully use them are not in their very Nature Illegal.

In general, as we have seen, all conditions and restrictions are lawful except those which are in "their very nature illegal."

There are certain restrictions or conditions which are clearly forbidden by this rule. Such are restrictions requiring the licensee to do something which it would be illegal for the patentee himself to do. Take the examples cited by the court in *Bement* v. *National Harrow Company*, supra. The patentee cannot himself sell a patented illuminating oil which falls below the requirements exacted by a state statute passed in pursuance of its police power. The patent law authorizes him to exclude all others from making, using, or vending such oil: it does not authorize the patentee himself to make, use, or vend it in violation of a valid state law. *Patterson* v. *Kentucky*, 97 U. S. 501. As it would be illegal for the patentee himself to sell such oil, he cannot lawfully require or authorize his licensee to sell it. Therefore, a restriction or requirement to this effect would clearly be illegal. In the same way the patentee of a telephone instrument cannot use it as part of a public service telephone business and decline to give all comers equal service. He, therefore, cannot authorize or require the licensee of his telephones to use them in a public service business without affording equal service to all, and a restriction in his license to the contrary is illegal.

The restriction in the present case, however, is of an entirely different character. It is unquestioned that the defendants could have refused to permit others to use their patented shoe machines, and could have used them exclusively themselves or have used any two or more of them exclusively. The question in this case, therefore,

is not whether the defendants can require their licensees to use their machines in a manner forbidden to the defendants themselves, but whether they can require the licensees to use the machines in a manner which would have been unquestionably proper and lawful if employed by themselves. Restrictions of this character are clearly not, in their very nature, illegal.

The Sherman Act does not apply to Restrictions which are Reasonable when considered with due regard for the Patentee's Lawful Monopoly.

The only possible objection to such a restriction must be that it restrains trade, and is, therefore, invalid, either at common law or, for the purposes of the present case, under the Sherman Act. But this court has held that the Sherman Act does not condemn restraints of trade arising from reasonable conditions imposed by a patentee upon his licensees.

Thus in *Bement* v. *National Harrow Company*, supra, the court said:—

> "But that statute [namely, the Sherman Act] clearly does not refer to that kind of a restraint of interstate commerce which may arise from legal and reasonable conditions imposed upon the assignee or licensee of a patent by the owner thereof restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

In *Henry* v. *Dick Co.*, supra, the court, after quoting the above language and after referring to the fact that the court in that case held that restrictions as to the price at which patented articles could be sold were reasonable and legal, said (p. 31):—

"If the stipulation in an agreement between the patentees and dealers in patented articles, which, among other things, fixed the price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantial law, imposed by a patentee as part of a sale of a patented machine, would be clearly valid and enforceable."

The language above quoted from the opinion in the Bement case was expressly quoted with approval in the recent case of *Standard Sanitary Manufacturing Company et al.* v. *United States*, 226 U. S. 20.

Reasons why the Sherman Act does not apply to Restrictions which merely require the Licensee to use in a manner which it would be lawful for the Patentee himself to use, or which are a mere exercise of the Patentee's Rights.

Without attempting to define all the classes of restrictions which might be legal under the rule laid down in these cases, the reason is clear why restrictions do not violate the Sherman Act which merely require a licensee to use a patent or patented machines in a manner or under conditions which would be lawful and proper if employed by the patentee himself.

The patentee has an absolute monopoly: he can exclude all others from making, using, or vending. The Sherman Act was not intended to destroy this monopoly. The patentee can sell at any price he pleases. He can, therefore, authorize a licensee to sell at a stipulated price, because in so doing he is not extending his monopoly, but is merely licensing another to exercise a part of his rights. The licensee, previous to his license, had no right to sell at

any price. The permission to sell at a specified price is, therefore, not in restraint of a previous right held by the licensee. It is a grant of a new right. Prior to the grant of the license, trade in the patented article was absolutely restrained. By the grant of the license the patentee partially removes this restraint. Far from restraining trade, therefore, by granting such a restricted license, he to this extent promotes it. It is true that, by granting a license to sell at any price the licensee pleased, the patentee might promote trade to a greater extent; but, having a right to enforce an absolute restraint, it is for him to decide whether such restraint shall be wholly or partially removed, and, if partially, to what extent. The licensee, having no right apart from his license to sell at any price, cannot complain because his license permits him to sell only at a stipulated price. It is the same in other cases in which the restriction consists of a grant of limited rights. Thus a patentee of a shoe machine has the right to restrain all others from using his machine anywhere. He can, therefore, without imposing any new restraint of trade, permit a licensee to use his machine only in Massachusetts. He has a right to restrain all others from using his machine to manufacture both men's shoes and women's shoes, and he can therefore permit a licensee to use them in manufacturing only men's shoes. In every such case he is partially removing a complete restraint which previously existed and is not imposing a new restraint. The Sherman Act condemned the creation of new restraints which were not legally authorized. It clearly did not condemn a license condition of the character above mentioned, which consisted in partially removing an existing legal restraint.

That the Sherman Law was not, either in letter or spirit, directed against restrictions imposed by patentees may with profit be illustrated from another point of view.

The patentee has an absolute right to exclude all others from the use of his invention or from the use of the patented

articles embodying the invention. The public have absolutely no rights in such patented articles. As said by the court in *United States* v. *Am. Bell Tel. Co.*, 167 U. S. 224 (p. 250),—

> "Counsel seem to argue that one who has made an invention and thereupon applies for a patent therefor, occupies, as it were, the position of a quasi trustee for the public; that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible. We dissent entirely from the thought thus urged."

It is important to contrast this fundamental characteristic of patented articles with the characteristics of ordinary unpatented articles of trade. With respect to such articles as grain, foodstuffs, lumber, or iron, there is a natural course and flow which has continued for years. As a matter of public policy, the law requires such trade to continue free from monopoly or undue restraint by any contract or combination. But with respect to patented articles, they did not exist until the inventor created them, and, therefore, prior to his invention there was no trade to restrain. After his invention he was by the patent law given an absolute monopoly and power of restraint for the period of seventeen years. There is therefore no trade in such articles to which the public is entitled, and therefore no trade in such articles which the law can hold should, on grounds of public policy, remain free and untrammelled. As a matter of public policy, the court is as much pledged to support and foster this monopoly and restraint which surround patented articles as in the case of unpatented articles it is pledged to encourage and insist upon freedom.

To use the expression "suppression or restraint of trade" with respect to patented articles is therefore to misdescribe the situation and misrepresent the facts. "Suppression" and "restraint" are expressions predicated upon a former state of freedom of trade. They imply the placing of a

restraint or restriction upon trade, which, but for such restraint or restriction, would be free and untrammelled, which is not the case with regard to patented articles until the patentee releases them from the domain of his monopoly.

If a patentee sells his patented articles or permits others to make and sell them, giving the vendees not only title to the materials of which they are composed, but also full and unrestricted licenses to use, such machines pass beyond the domain of the patentee's power. As to contracts concerning such articles, the ordinary rules of public policy relating to restraint of trade would apply. But, until such articles are released from the domain of the patentee, trade in them is absolutely restrained, and the patentee can make no contract with reference to them which can properly be regarded as creating a restraint of trade, as there is no lawful existing trade to restrain, nor can he do acts which can properly be said to create a monopoly in such articles, as a complete monopoly already exists.

It is evident, then, that the Sherman Act, which is directed against contracts or conduct which creates restraints of trade or monopolies, cannot apply to a contract or to conduct of a patentee by which he merely excludes others from the use of his patented articles or permits a restricted use of them.

In *Park* v. *Hartman*, 153 Fed. 24, at page 27 Mr. Justice Lurton (then circuit judge) said,—

> "That articles made under patents may be the subject of contracts by which their use and price in subsales may be controlled by the patentee, and that such contracts, if otherwise valid, are not within the terms of the act of Congress against restraints of interstate commerce or the rules of the common law against monopolies and restraints of trade, is now well settled."

In *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 358, the court said:—

"The Sherman law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power; each was professedly to advantage the public; the necessary implication is that not one iota was taken away from the patent law; the necessary implication is that patented articles unless or until they are released by the owner of the patent from the dominion of his monopoly are not articles of trade or commerce among the several States."

In *Cilley* v. *United Shoe Machinery Co.*, 152 Fed. 726, it was said,—

"Contracts with respect to patents are, as a general rule, outside the doctrine of restraint of trade, both at common law and under the Federal Statute."

To the same effect are:—

Dickerson v. *Tinling*, 84 Fed. 192.
Edison Phonograph Co. v. *Kaufmann*, 105 Fed. 960.
Same v. *Pike*, 116 Fed. 863.
Rupp v. *Elliott*, 131 Fed. 730.
Victor Talking Machine Co. v. *The Fair*, 123 Fed. 424.

If Trade is affected by Reason of such Conditions or Restrictions imposed by Patentees, such Effect is Incidental to the Exercise of Lawful Rights, and therefore is itself Lawful.

Of course, the grant by a patentee of a limited or restricted right may seriously affect the course of trade. If any such result can be called a restraint of trade, however, it is a result arising incidentally from the exercise of legal rights lawfully exercised, and is, therefore, not the character of restraint condemned by the Sherman Act. An example of such incidental restraint is furnished by *Heaton-Peninsular Button-Fastener Company* v. *Eureka*

Specialty Company, 77 Fed. 288. There the use of the patented machine for affixing buttons to shoes was restricted to use with staples furnished by the patentee. As such machines largely displaced all other machines previously used for the purpose, as appeared in that case, the market for the sale of staples to the shoe trade not adapted for use in the patented machines was practically destroyed, and, further, the users of the machines were restrained from purchasing staples for use on the machine other than from the patentee, and other persons were restrained from selling staples for such use. Of this result Judge (now Mr. Justice) Lurton said (p. 296): "The monopoly in the unpatented staple results as an incident from the monopoly in the use of complainant's invention, and is, therefore, a legitimate result of the patentee's control over the use of his invention by others. Depending, as such a monopoly would, upon the merits of the invention to which it is a mere incident, it is neither obnoxious to public policy, nor an illegal restraint of trade."

Another example of an incidental restraint is furnished by the case of *Henry* v. *Dick Co.*, supra, where the patentee's mimeograph could be used only with stencil paper and ink furnished by the patentee. Again, to the extent that this mimeograph process took the place of other processes for copying, the trade in paper and ink for such other copying purposes was destroyed and others were restrained from engaging in the business of furnishing such supplies for the new process.

A further example of the far-reaching but lawful effect on trade of the exercise of patent rights covering important or essential machines is set out by the court in the *Heaton-Peninsular Case*, supra (p. 295):—

> "Let it be supposed that the patents owned by this complainant were of so wide a character as to cheapen the process of manufacturing shoes, and to drive from

competition all other modes of manufacture. Then suppose the patentees were of opinion that they could most profitably enjoy their inventions by retaining the monopoly of the use, and engaging in the manufacture of shoes. If content to undersell all others, they could engross the market for shoes, to the extent of their capacity to supply the demand during the life of their patents, or so long as their invention was not superseded by subsequent inventions still further cheapening the cost of manufacture. The monopoly thus secured would be the legitimate consequence of the meritorious character of their invention. Yet just such monopolies may result whenever a new and surprising advance is made in some art of wide and general use. The great consuming public would be benefited, rather than injured, for the monopoly could endure so long only as shoes were supplied at a less price than had prevailed before the invention. Now, if the patentees, by retaining to themselves the exclusive use of their invention, are able, legitimately and lawfully, to acquire a monopoly of the manufacture of shoes, and destroy the shoe market for those who before had shared it, why may they not, by a system of restricted licenses, permit others to use their devices on condition that only some minor part of the shoe,—the pegs, the tips, the thread, or the buttons, or the button fasteners,—shall be bought from them? If these concessions were such as to enable others to compete, though their use of the mechanism was restricted by the terms of the license, who could justly complain, if the inventors, content with a monopoly of the market for the article named in their license, surrendered the opportunity for a monopoly of the manufacture of the complete shoe? The device protected by the patents owned by complainant is of no such wide or radical character as that used for purposes of illustration. Yet there is no appreciable difference in the legal principles applicable to the supposed facts used for illustration, and those stated on the face of the complainant's bill."

The far-reaching effects produced on trade by the methods employed above are, however, incidental to the lawful

exercise of patent rights and are, therefore, not within the intent of the Sherman law any more than is a monopoly or restraint of trade resulting solely from a manufacturer's superior economy in manufacture or the greater attractiveness to consumers of his articles. Any such restraint is one of those incidental restraints to which the act was not directed.

Patentee's Compensation need not be Direct, but may come from the Sale or Use of Some Other Article.

It is further well settled that the return which the patentee obtains need not be direct. In the Heaton-Peninsular case, supra, the patentee required that his machines be used only with staples purchased from him, thus seeking to obtain his return indirectly from the profit on staples. As said by the court in that case, "they have chosen to fix the price for the right of use at the profit resulting from the sale of staples."

In *Henry* v. *Dick Co.*, supra, the profit came, not from the sale of the patented mimeograph, but from the sale of stencil paper and ink, the mimeograph being restricted to use with such paper and ink bought of the patentee.

There are numerous other familiar and well-recognized methods by which owners of patents obtain their profits through lawful but indirect methods. A manufacturer of a sewing-machine may purchase a patent for an attachment. He may refuse to sell it except with his sewing-machines, not increasing the price of his machines because of the addition of the attachment. He will hope to obtain his profit by inducing people who would otherwise buy of his competitors to purchase his machines because they desire the patented attachment. A manufacturer of cotton mill machinery may acquire a patent or exclusive license to manufacture patented spindles, paying a price for the patent, or a royalty for its use, which forbids his obtaining

any profit from the resulting spindle business, but believing that the cotton manufacturers who come to him for the improved spindle will be induced to buy his looms and other machinery, thus bringing him a profit. Or he may believe that, while the royalty is so high during the life of the patent or the expense of introducing the new spindle so great that he will obtain little or no profit therefrom during the life of the patent, yet he will at the termination of the patent, owing to the fact that he is then doing the entire business and knows best how to conduct it, have acquired a good-will which it will be difficult for his competitors to overcome, and that at the termination of the patent, being no longer required to pay a royalty, he will reap his profit.

All of these methods are lawful. Whether they are to the benefit of the public is, as we have shown above, not a question for the courts to determine, as they result from the lawful exercise of the patentee's rights. As said by the court in *Henry* v. *Dick Co.*, supra (p. 35),—

> "And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries requires to be restrained, Congress alone has the power to determine what restraints shall be imposed."

Restrictions adapted to the Purpose of protecting the Patentee in the Enjoyment of his Patent, adopted by him for such Purpose, and accepted by the Licensee for the Purpose of enabling him to enjoy the Benefits of the Patent, and which merely limit the Right of Use are Reasonable, and not condemned by the Sherman Act.

So far as the Sherman Act is concerned, the only qualification stated by the court in *Bement* v. *National Harrow Co.* and *Henry* v. *Dick Co.* upon the right of patentees

to impose any conditions they please is that the restrictions or conditions should be reasonable and legal. Without attempting to define or classify all classes of restrictions which might be deemed reasonable and legal, it seems clear that, so far as the Sherman Act is concerned, which act only condemns restraints of trade and monopolies, any restriction or condition "imposed by the patentee, and agreed to by the licensee" for the right to use the article, and which restriction or condition consists solely of the grant of a partial license to use a patent or a patented article, whereby the licensee is limited to a use under conditions which might be legally and properly employed by the patentee himself, must be reasonable, legal, and in the public interest, as it certainly can impose no new restraint, but, on the contrary, relaxes an existing restraint. It is to be noted, however, that such conditions must be imposed and accepted for the right to use the patented article. The purpose of the patent law was to enable patentees to obtain the greatest possible financial return from the use of their inventions. It was not intended to enable persons to do acts otherwise illegal under pretence of exercising or enjoying patent monopolies. If, therefore, the restriction or condition is imposed by the patentee, not because the patentee is seeking as great a profit as he can get from his invention, or is accepted by the licensee, not in order to enable him to use the invention, but for some ulterior and unlawful purpose, such as the elimination of competition between himself and other licensees, the unlawful result is not made lawful because the agreement to accomplish it is clothed in the form of a restriction on the use of a patented article. Thus a dozen competing manufacturers of looms cannot accept licenses for some patented attachment or improvement for looms containing a restriction designed and adapted to eliminate competition among themselves, when their purpose in accepting such licenses is to eliminate such competition and only incidentally, if at all, to obtain the use of the patent.

The elimination of competition would not result incidentally from provisions in the licenses accepted by the patentees because they desired the use of the patent, but, on the contrary, the licenses to use the patents would result from the intent and agreement to eliminate competition. See *Standard Sanitary Co.* v. *U. S.*, 226 U. S. 20.

Where, however, the restrictions in the licenses are adapted to the purpose of protecting the patentee in the enjoyment of his patent or of giving him a return for the use thereof, and are adopted by the patentee for this purpose and are accepted by the licensee for the direct purpose of enabling him to enjoy the benefits of the patent, and where the restriction or condition consists merely in granting a limited or partial instead of a complete right under the patent, the Sherman Act cannot apply.

The Restrictions in the Present Leases merely require Shoe Manufacturers to use the Defendants' Patented Machines in a Manner in which the Defendants Themselves might lawfully use Them, and constitute merely Limited Licenses to use. They are Reasonable and Legal.

The license restrictions in the present case were clearly of the class to which we have above referred, and merely limited the right of use granted shoe manufacturers to a use under conditions which would have been entirely lawful if employed by the defendants themselves. The defendants could legally restrain all shoe manufacturers from using any of their machines. They could use such machines exclusively themselves and only manufacture shoes which were manufactured wholly by the use of their own machines. But the defendants did not undertake to enforce this complete restraint, as they might legally have done, and thus have prevented others entirely from making use

of the superior advantages of their machines. On the contrary, they consented partially to remove the existing restraint on the use of their machines. They said to shoe manufacturers: "We will license you to use some or all of our machines, but under certain conditions under which we may lawfully and properly use them: if you take one or more of our machines, you must also use some other kinds. If you do not, your license will be terminated." To the extent that the defendants thus permitted others to use their machines they removed a restraint which would otherwise have existed and gave shoe manufacturers rights which they did not previously have. They created no new restraint. Shoe manufacturers remained as free as ever to use machines furnished by themselves or by others than the defendants. They were not compelled to use any of the defendants' machines. Having no right to use any one of the defendants' machines, except with the defendants' consent, they could not complain, nor was any new restraint of trade imposed upon them when the defendants permitted them such use, but subject to the same conditions under which the defendants themselves were using or might have used the machines.

We may now consider the purpose of the restrictions contained in the present leases. We have above shown that they consist of the grant of a partial as distinguished from a complete right of use. The next question is whether the particular limitations here involved are reasonable, that is, are adapted to the protection of the defendants' patents or to enabling them to obtain a return for the same, and are imposed by the defendants for this purpose and accepted by shoe manufacturers for the *bona fide* purpose of enabling them to obtain the use of the defendants' inventions, and not for some ulterior and illegal purpose.

It is evident that shoe manufacturers, in accepting these restrictions, had no object in view except to obtain the use

of the defendants' patented machines and to give in return therefor the compensation demanded by the defendants. The shoe manufacturers did not seek as did the defendants in *Standard Sanitary Manufacturing Co.* v. *U. S.*, supra, to restrain competition among themselves. They did not seek to restrain competition between the defendants or between the defendants and others. So far as they were concerned, there was clearly no ulterior purpose.

It is equally clear that the defendants had no purpose other than to reap a greater return from their patents, getting the largest possible market for their patented machines either by increasing the use of their patented machines or by decreasing the cost of maintaining such machines in proper repair or by both means. The restrictions imposed were adapted to accomplish these results in several ways.

1. Although the defendants' machines were the best made, it is possible that there were shoe manufacturers who, while they preferred most types of the defendants' machines, desired to buy certain machines from others because they were cheaper. In such case the defendants would obtain a greater profit by requiring the use of some other machine or machines with each machine leased.

2. The defendants' machines were the best, and, therefore, presumably produced the best shoes. If an inferior machine were used in certain parts of the process, it might result in the production of inferior or defective shoes. If, therefore, the defendants' machines were used exclusively or certain groups of the defendants' machines were used exclusively on all shoes produced by any given shoe manufacturer, and it appeared that the shoes so produced were better than those produced when the defendants' machines were not so used, the public would come to demand shoes made on such machines belonging to the defendants, and thus increase their reputation and use.

3. The defendants leased their machines, and, therefore, they doubtless received a royalty for their use. The more shoes, therefore, which passed through each machine in a year, the greater in the long run would be the defendants' royalty. Each of the different shoe machines is employed in the successive steps of making a single shoe. If one machine in the line breaks down, it stops work on the other machines, as it stops the flow of shoes through the successive machines. The defendants, by requiring that, if one machine was leased, an efficient machine (in place of an inferior machine which might break down) should be used in connection with the leased machine, and by keeping its machines in repair and at their highest efficiency, could thereby increase the number of shoes on which each leased machine was employed during the course of the year, and thus increase their royalties.

4. The defendants leased their machines, and were, therefore, as owners under the responsibility, which even the vendor of machines is under to some extent of maintaining their machines in proper condition and repair in order to maintain their reputation. It was cheaper and easier for them to attend to this responsibility, and they could do it more effectively, if a number of machines in any given factory belonged to them than they could if only a few belonged to them. It would not pay to send a repair man to Michigan to care for a single machine: it would pay, however, if several machines in the factory belonged to the defendants. The economies resulting from this use of groups of machines rather than isolated machines thus increased the defendants' net return, without increasing the royalties charged for the machines, and the more efficient condition in which they were thereby enabled to keep the machines enhanced their reputation and use, and, therefore, the return to the defendants.

We respectfully submit that the restrictions in the present leases or licenses were adapted to accomplishing the

above results; that it does not appear that any ulterior result or results of a different character were thereby sought; that these restrictions, therefore, were designed to bring in a better return to the defendants for their patents and to enhance the reputation of the defendants' machines, and that they were imposed by the defendants for this purpose and accepted by the licensees for no ulterior purpose, and that, giving effect to the patent monopolies held by the defendants, they were clearly lawful.

If any Restraint resulted, it was Incidental to the Lawful Exercise of the Defendants' Patent Rights.

Let us inquire for a moment what restraint, if any, was produced by these provisions.

It cannot be contended that the defendants' conduct in ceasing to sell and confining themselves to leasing (considered apart from the particular restrictions contained in their leases) produced an illegal restraint. Patentees can sell or not, as they please. Because they sell one hundred or one thousand machines, the public is given no right to demand that they sell more. If they can obtain a better return by leasing than by selling, they are free to make the change. The right to stop both selling and leasing entirely includes the right to change from one method of marketing their goods to the other.

The only restraint resulting from these restrictions, therefore, was that shoe manufacturers were unable to use certain of the defendants' machines without using others, or, to state it strictly in accordance with the charge made in the indictment, were unable to use one kind without using at least one other kind. But the shoe manufacturers had no right to use any of the defendants' machines without the defendants' consent. What right had they, then, to say that, while the defendants could refuse to let them

use all or any of their machines, if the defendants did consent to let them use all of their machines or certain groups of their machines, the defendants must also consent to let them use any one of their machines? Why was it not reasonable for the defendants to say: "We are entitled to restrain all others from using these machines, and to use them ourselves to produce what we believe to be the best shoes. You have no right to use these machines at all, but, if you wish to do so, you must use them all. If you do not wish to use them under this condition, you are under no obligation to do so, but may use the machines of others if there are such. Rather than permit you to use a part of our machines, in which case our return might be too small to compensate us or the reputation of our machines might suffer because of the inferior shoes produced, we prefer to use them exclusively ourselves, or to permit others to use them who will use them in the manner we suggest." And, if they could say this, could they not clearly say that they would not permit the use of one machine out of a great variety unless at least one other (presumably a machine especially adapted for use in connection therewith) was also used?

We submit that it is settled by the decisions of this court that the defendants, having an absolute right to restrain all use of their machines by others, may grant the limited use above referred to. Argument that a grant of a full and complete use would be more beneficial to the public and result in less restraint of trade is beside the point, if we admit the legality of the patentee's monopoly. As said by the court in *Henry* v. *Dick Co.*, supra, with reference to the inconvenience of certain suggested conditions which patentees might impose (p. 34):—

> "But these illustrations all fail of their purpose, because the public is always free to take or refuse the patented article on the terms imposed. If they be too onerous or not in keeping with the benefits, the patented

article will not find a market. The public by permitting the invention to go unused loses nothing which it had before and when the patent expires will be free to use the invention without compensation or restriction. . . . It must not be forgotten that we are dealing with a constitutional and statutory monopoly. An attack upon the rights under a patent because it secures a monopoly to make, to sell and to use is an attack upon the whole patent system. We are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor's exclusive right of use."

Consideration of Bement v. Harrow Co., Henry v. Dick Co., and Standard Sanitary Co. v. U. S.

It will be well to examine briefly the three recent cases in which the legality of restrictions imposed by patentees have been considered by this court.

In *Bement* v. *National Harrow Company*, supra, the Harrow Company granted a license to use eighty-five different patents in the manufacture of a certain type of harrows under the following, among other restrictions: the licensee agreed that he would not sell at less than specified prices; that he would not during the term of the license be engaged in the manufacture or sale of any other harrows; that he would not change the construction of the harrows that he was licensed to make, and that he would not contest the licensor's patents. The licensor agreed not to license any other person to make the particular type of harrow which the licensee was authorized to make.

These restrictions go far beyond those imposed by the defendants in the present case. They would clearly be illegal if not for the patents. The licensee was forbidden to sell machines which he himself made and to which he had title.

He further agreed to restrict the character of harrows he would make. The patentee agreed not to permit others to use his license patent to make machines like the licensee's; in other words, restricted his right to enjoy his own patent rights.

In our case the defendants merely restricted the use of machines which they themselves owned.

In *Henry* v. *Dick Co.*, supra, the patentee sold a patented mimeograph under the condition that it should be used only with stencil paper, ink, and other supplies made by the patentee. It was held that the patentee could enjoin, as a contributory infringer, another dealer in ink from selling ink to the owner of such a mimeograph with the intent that it should be used thereon.

If the patentee in the Dick case could obtain his profit by requiring the purchase from himself of all supplies used on his machine, clearly the defendants in the present case can obtain a portion of their profit for their machines by requiring the use in connection therewith of another machine or machines used in the same process of manufacture.

It is to be noted that in two respects the Dick case went much further than the present case. It permitted the restrictions to be maintained upon articles after they were sold. If public policy were to be considered at all in determining the validity of restrictions, an argument might be made that the court should hesitate to separate the title to a machine embodying a patent from the right to use it, with the result that, if the particular use for which the machine was licensed had to be abandoned it could not be used at all.

Again, in the Dick case the restrictions required a purchase from the patentee of unpatented supplies, and thus enabled him to obtain a monopoly of the business of furnishing unpatented articles for use on his machines. In our case only the use of other patented machines is required. The patentees do not project their control beyond the field of their own lawful patent monopolies.

In *Standard Sanitary Manufacturing Company* v. *United States*, 226 U. S. 20, sixteen competing manufacturers of enamelled ware accepted licenses under a patent for an implement which was useful in, but not essential to, one out of many steps in the manufacture of the ware. Prior thereto the Standard Company, one of the manufacturers, had owned the patent, and none of the others had had licenses. A few of the others had used it by infringing, others had not used it at all. In accordance with an arrangement made by one Wayman the Standard Company transferred the patent to him, and he granted licenses to all the competing manufacturers to use the patented implement. Under these licenses the manufacturers agreed, among other things, to sell their enamelled ware only at prices determined by a commission composed of the licensor and of five of their number. All jobbers were likewise required to sign licenses agreeing to sell only at stipulated prices and to buy all their enamelled ware from the licensees. The concerns which accepted such licenses manufactured 85 per cent. of the total production. "The trade was, therefore, practically controlled from producer to consumer and the potency of the scheme was established by the co-operation of 85 per cent. of the manufacturers and their fidelity to it was secured, not only by trade advantages, but by what was practically a pecuniary penalty." . . .

The agreements were clearly in restraint of trade under the Sherman law unless justified as restrictions under the patent. That they were not thereby justified was clear because certain of the provisions were not adapted to protect the patentee in his rights or to enable him to obtain a profit, and especially because it appeared that they were not accepted by the licensees for the purpose of enabling them to obtain the use of the patent except incidentally, but were adopted and accepted for the purpose of enabling them to carry out their agreement to eliminate competi-

tion. The use of the patented implement was a secondary purpose.

The court emphasizes the circumstances showing this. Thus the Standard Company which had owned the patent prior to the combination was unwilling to grant licenses and the other manufacturers were unwilling to accept them until the scheme for the elimination of competition was proposed. The manufacturers were also unwilling to accept the licenses until 83 per cent. of the total production assented, and it was provided that the licenses should not go into effect until such assents had been obtained. Furthermore, the patentee testified that "he hoped as one of the features of the license agreements to enable the companies to abolish ruinous competition," and he induced jobbers to accept licenses by stating that it was "a matter entirely for the jobber's benefit," and "much more advantageous than a continuous cut market."

The reason the Standard Company parted with its patent to the licensor was to secure agreements from its competitors for the elimination of competition. For this same reason the other manufacturers and likewise the jobbers accepted licenses, and not primarily for the purpose of obtaining the use of the patented implement. What the licensor offered as his primary consideration was not the use of the patent, but the mutual agreements of the manufacturers to eliminate competition. It is clear in this case that the conditions were not accepted by the licensees because they desired the use of the patent. They were not conditions "imposed by the patentee," but rather conditions imposed by the licensees without which they would not have accepted licenses. The elimination of competition, therefore, did not result incidentally from the desire of the licensees to use the patented article and their consequent willingness to submit to conditions which the patentee deemed it to his advantage to impose. The combination condemned consisted of mutual agreements among the com-

peting manufacturers and jobbers to eliminate competition. It was held that these were not justified because of the fact that in the hope of legalizing them (and not for the primary purpose of obtaining patent rights) these mutual agreements were put in the form of patent restrictions covering an implement useful in, but not essential to one step in the manufacture of their unpatented product. If the patented article in question had been essential to the manufacturer of enamelled ware, and the Standard Company, the original owner of the patent, had, by its ownership of the patent and the right to its exclusive use, been in a position to prevent all others from engaging in the business and thus to eliminate competition, and, instead of so doing, had permitted the other concerns to use the patent if they complied with such restrictions, an entirely different situation would have been presented.

As the court did not deal with it, we say nothing further of the further fact that the articles in which competition was eliminated were not themselves patented and that the patent only covered an implement useful, but not essential, to one step in the process of manufacturing such articles. This would, of course, clearly distinguish the cases. The restrictions were not imposed on patented articles owned by the patentee, but on unpatented articles owned by the licensee.

It is also unnecessary to lay further stress on the material fact that prior to these licenses there was active competition between the sixteen defendants which was entirely eliminated after the adoption of the licenses, as was also all competition among jobbers. In the present case there was no such previously existing competition among the defendants, and, therefore, no competition was eliminated.

Government's Contention as to the Rule in Henry v. Dick not Justified.

It is contended by the government that the rule laid down by this court in the Dick case is limited to a right to restrict a patented machine to use with articles coming in direct physical connection with the machine, such as the ink and stencil paper in the Dick case. We find no such limitation in that case. Of course, in that case the supplies were used in direct physical connection with the machine, but the principle on which the court based the right to impose this restriction cannot in reason be limited to articles so used, nor is there any intimation in the opinion of the court that it should be so limited. That case was decided on the broad general ground that, because a patentee can exclude all others from the use of his machine, he necessarily has the lesser right "of permitting others to use upon such terms as [he] the patentee chooses to prescribe."

The contention of the government comes to this. The defendants could have required that all the leather, thread, canvas, and nails used on the shoes manufactured by the defendants' machines should be purchased from the defendants, but they could not require that certain of the machines used in the successive steps of manufacture in connection with the defendants' machines must be the property of the defendants. The result of requiring such materials to be used on the machines would be to give the defendants an enormous control over the unpatented leather, thread, nail, and canvas business, and to drive out of business the dealers in such unpatented articles whose business it was to supply the shoe trade,—a far more serious result from the point of view of public policy and convenience than was accomplished by requiring shoe manufacturers, the greater part of whom were already using exclusively

or in large part, the defendants' patented machines (which no one was entitled to use or trade in without their consent), to use them exclusively.

If there can be found any reason for the government's contention, it must be sought in a distinction between requiring the use of the patented article with some unrelated article and requiring its use in connection with a related article of such a character that it enables the patented machine to do effective work and produce its best results.

It may be sufficient to say in answer to the above suggestion that it is controverted by the decision in the Dick case itself. It did not appear in that case that the ink, stencil paper, and other supplies furnished by the patentee were especially adapted for use in the patented mimeograph, or that those furnished by others could not be equally well used. Furthermore, the court in that case, referring to suggestions of the inconvenience which would result from requiring the connected use of unrelated articles, said that, if the conditions were too onerous, the public had the right to decline to use the invention; but that it was for the patentee to decide whether or not such use should be required (p. 34).

But, further, it seems clear that in the present case there was far more reason for requiring the connected use of certain or all of the defendants' various patented machines than there was for requiring the use of the patented mimeograph and unpatented supplies in the Dick case.

The defendants' machines were each used in the successive steps of manufacturing a single shoe. Each was as directly necessary to the manufacture of a shoe as the ink and paper to the use of the mimeograph. Further, the defendants' machines are alleged to have been the best made. It is clear that, if all or at least several were used, they would produce better results than if a less number were used and inferior machines displaced the others. The result would be

an inferior product, which might detract from the reputation of the defendants' machines, as we have shown above.

The defendants, doubtless, received a royalty for their patented machines, dependent on the number of shoes on which each was employed. The use of an inferior machine, likely to break down, in certain or all steps of the process would reduce the use of the defendants' machines and consequently their royalties.

We have also shown above how the defendants could furnish better service and keep their machines in better repair at less cost, and thus enhance the reputation of their machines and reduce their expenses by furnishing a number instead of a single one of the machines in a factory.

The Leases would have been Lawful if the Machines had not been patented.

As the restrictions in the present case only limited the use of machines owned by the defendants, as they were so clearly designed to advance the defendants' business, and as the economy and efficiency resulting from this method of using their machines are so obvious, we submit that the restrictions imposed by the defendants would be legal, even if the machines were unpatented.

Furthermore, they would have been justified, as a lawful method of marketing the machines. The proper method of marketing goods is one of the most, if not the most, important feature of our modern commercial life. One man sells only at wholesale, one at retail, one through agents, another through a chain of stores owned and maintained by himself, one only upon orders sent by mail (the modern mail order house), one leases, another sells outright, one sells for cash only and is able to sell cheaper, another sells on the instalment plan and appeals to the poorer or less thrifty, one

sells through commercial travellers, another by advertising in magazines or through the mails, one offers premiums with each purchase, another makes discounts for large or continued purchases, one sells on long-time contracts providing for all the customer's business, one makes no distinction between large and small customers. The above are only a few of the numerous methods employed by modern salesmanship. They are normal and proper because designed to advance the dealer's business by making either his goods or terms of purchase more attractive, or by bringing them to the attention of customers, without using improper means to prevent others from making the same appeal, and at the same time leaving the customer free to accept the terms proposed or not as he pleases. Because the method of marketing his goods adopted by a dealer does not appeal to any particular customer, the dealer is not obligated to change it, nor is he obligated to change it because it proves more attractive or persuasive than the methods which other dealers adopt or are in a position to adopt, so that their trade is in consequence destroyed. The method adopted by the defendants of leasing their machines only in groups, that is, the wholesale method, which enabled them to offer wholesale prices, which enabled them more efficiently and cheaply to keep their machines in repair, and which enabled them to maintain the reputation of the shoes produced by their machines, and, consequently, the reputation and desirability of their machines, was a normal and proper means of advancing their business.

If a man makes and furnishes for hire a mowing-machine, a tedder, and a rake, all useful in the operation of making hay, and charges a certain amount for each day's use of each machine, is it unreasonable for him to refuse to let a single one of the machines to A, when B stands ready to take and pay for all three? Or, if A takes all three, but uses and pays for only one, is it unreasonable for the owner

to require the return of all three, when he has a market for the set of three?

Suppose, again, he finds from experience that, if he leases only one or two of the machines, the trouble of sending out the machines, of seeing that they are returned, of collecting his rental, and of sending some one to make occasional repairs or instruct the lessee in their use, is so costly that the machines do not pay him a reasonable profit: is he not justified in requiring that all three be used?

Suppose he leases two of the machines, and finds that, owing to the use of a third inferior machine in connection with them, the hay is damaged, or the total capacity of all three machines is smaller than it should be, and he believes it may be attributed by others to defects in his machines: is he not again justified in requiring the use of all three?

It is to be especially noted in this case that the defendants owned all the machines to which these restrictions were applied. They did not undertake to sell them and still retain control by restricting their future sale or use contrary to the common law rule against restraints on alienation. They merely provided that, if the lessees did not choose to continue using certain machines to which the defendants had title, the leases should terminate.

United Shoe Machinery Company v. *Brunet*, 1909, A. C. 330, is peculiarly in point, as it involved leases containing far more stringent provisions made in Canada by a subsidiary company of the United Shoe Machinery Company. The court having determined that it was not shown that any patents were involved, the leases were upheld as leases of unpatented machines which were valid at common law.

The facts are stated in the head-note of the case as follows:—

> "By various leases in 1903 and 1904 the appellants leased to the respondents for twenty years machines made and used for certain processes in the manufact-

ure of shoes, containing in each case a 'tying clause,' the effect of which was to prohibit the use by the respondents in the said manufacture of any machines not leased by the appellants. Some additional leases were granted of other and allied machines to be used for certain ancillary processes in the same manufacture. These latter the respondents called upon the appellants to remove, but continued to work the former in conjunction with machines not leased to them by the appellants."

We quote at length from the opinion of the court:—

"The findings of the jury, therefore, dispose completely of all questions arising on the Patent Act, as, indeed, they also dispose of all the charges of fraud and coercion, since they remove the foundation on which the first charge rests, and their answer to question 19 limits the latter to the presentation to the shoe manufacturers of Canada of the alternative of either doing without these machines altogether, or of hiring them on terms identical with or similar to those contained in the 'leases sued on.' This alternative, however, does not subject the would-be customers of the appellants to any coercion beyond what their desire to promote their own trade interests imposes upon them. By virtue of the privilege which the law secures to all traders, namely, that they shall be left free to conduct their own trade in the manner which they deem best for their own interests, so long as that manner is not in itself illegal, the respondents are at liberty to hire or not to hire the appellants' machines, as they choose, irrespective altogether of the injury their refusal to deal may inflict on others. The same privilege entitles the appellants to dispose of the products they manufacture on any terms not in themselves illegal, or not to dispose of their products at all, as they may deem best in their own interest, irrespective of the like consequences. This privilege is, indeed, the very essence of that freedom of trade in the name and in the interest of which the respondents claim to escape from the obligations of their contracts: *Hilton* v. *Eckersley* (1), approved of in *Mogul*

Steamship Co. v. *McGregor, Gow & Co.* (2). The latter case, indeed, affords a striking example of the lengths to which traders, in the *bona fide* defence or promotion of their own trade interests, may lawfully push this privilege, regardless of the injury, clearly foreseen by them, which they may thereby incidentally inflict on the trade of their rivals. It is not disputed that the machinery manufactured by the appellants is of a superior description, but it is contended that, if machinery superior to theirs should be put upon the market during the currency of these leases, the respondents, and others in the like position, would, to the vast injury of their trade, be by such leases prohibited from using those improved or superior machines. This, however, is a very remote contingency, since the appellants, having, as is alleged, captured the entire trade, are unlikely not to keep abreast of invention or to allow the field they have won to be occupied by others. Of course it will always be open to any individual trader who may be defrauded by the alleged false representation of the appellants to repudiate his contract, and, whether he repudiates or not, sue for damages in an action for deceit; but, putting aside fraud and coercion in this case, as the findings of the jury necessitate that they should be put aside, and also putting aside the possibility of the shoe manufacturers of Canada being obliged to use the inferior machines of the appellants while superior machines are on the market and available for use, the respondents' defence in effect resolves itself into a claim that the appellants are to be held to be under a legal obligation to produce and dispose of their manufacture on terms similar to those imposed by the Canadian Patent Act on patentees.

"It may be quite reasonable and right that the State, in consideration of the valuable rights and privileges it confers by its patents, should, in the interest of the public, impose these terms and conditions on their patentees, but they cannot in the alleged interest of the freedom of trade, of which they are in truth to a large extent the negation, be imposed upon persons who are not patentees, nor can contracts containing terms and conditions different from and more onerous on traders who are parties to them than those the State prescribes be

held, solely because of that circumstance, to be in restraint of trade and void as against public policy. The validity of these contracts must therefore be judged apart altogether from the provisions of this statute. . . .

"If the monopoly established by the appellants and their mode of carrying on their business be as oppressive as is alleged (upon which their Lordships express no opinion), then the evil, if it exists, may be capable of cure by legislation or by competition, but in their view not by litigation. It is not for them to suggest what form the legislation should take, or by what methods the necessary competition should be established. These matters may, they think, be safely left to the ingenuity and enterprise of the Canadian people."

But it is, as above stated, unnecessary to justify these restrictions as applied to unpatented articles. They are clearly justified by the defendants' patents.

The Leases being a Lawful Exercise of Patent Rights, the Merger of the Three Companies does not affect their Legality.

It was found by the District Court that the incorporation of the provisions we have been considering into the leases was not contemplated at the time the three companies were merged. But, assuming for argument that it was contemplated at the time of the merger, this could not affect the legality of the leases.

We have shown above that the indictment does not allege that the defendants required a shoe manufacturer leasing a machine which belonged to one group to use a machine belonging to another group. That is, it does not appear that the defendants required the use of a machine which before the merger had been made by one of the three combined concerns to be used with a machine which before the merger had been made by another of the three

concerns, so that it does not appear that the defendants' restrictions were any broader in their scope than might have been imposed by the three concerns acting independently.

But, further than this, the restrictions in the leases were justified as lawful restrictions imposed by patentees. Their effect was not to restrain trade. We have fully shown above that, as the three groups of defendants lawfully owned their patents and could prevent any use of their patented machines, the grant of a limited use was not a restraint, but the relaxation of an existing restraint. As, therefore, no restraint of trade was produced by the grant of a limited right of use, but, on the contrary, a greater freedom of trade, the defendants did nothing unlawful in combining to accomplish it.

Further, the defendants had a right to combine, if they thereby were enabled to obtain a better return from their patents. Take the Dick case as an example. Suppose in that case the patentee had not manufactured ink, and had restricted his machines to use with ink purchased from another manufacturer, having made an arrangement with the latter whereby a certain percentage of the profit on the ink was paid him, would this have been unlawful? And could he not have combined with such other manufacturer? And, if possible objection could be raised to such a merger, is it not clear that he could have so combined, if the ink made by such other manufacturer had been patented and was the best ink made, and therefore, when used in connection with his machine, produced the best results? Before such combination the public would have had no right to use either the ink or the mimeograph. The owners of the two patents could have lawfully stopped furnishing both. After the combination the public would be granted a right to use both, subject only to their use in connection with each other.

The present case is even stronger; for here there were

other objects to be accomplished, viz., the greater economy and added efficiency in furnishing and caring for a group of machines rather than isolated machines.

If various patents on different but related subjects, are owned by different persons and the various patentees decide that such patented machines can most effectively be used together, they are clearly entitled to combine their patents and use them in connection with each other. As, then, the defendants could have combined and used their patented machines exclusively themselves, it is clear that they could combine and grant others a limited use of their patents, that is, a use under the same conditions under which they could use the machines themselves.

Numerous examples of lawful combinations of related patents can be given.

A manufactures a patented automobile engine, B a patented automobile wheel, C a patented automobile body. They can clearly combine, if they deem it to their mutual interest, and produce a completed automobile, and, if they choose, decline to sell the parts separately, and only sell the completed product.

Take the case of *Commercial Acetylene Co.* v. *Autolux Co.*, 181 Fed. 387. If the patent for the tank designed to contain the gas was owned by A, and a patent on the gas peculiarly adapted to produce the best results with it were owned by B, could they not unite ownership, and insist on the use of both together? The public are not entitled as of right to use either. Each may be unwilling to surrender his ownership to the other, and, unless they combine, the world will be deprived of the most beneficial results.

It may be noted that the circuit courts of appeal in several cases have held that a combination of the owners of patents covering competing machines was lawful. We believe this position justified, but its correctness is not relevant to the present discussion. There was no competition between the defendants in the present case. An agreement by a

patentee not to use his patented article in competition with the patented articles of another is quite different from a use by the patentee of his patented article or a grant by him of restricted rights of use. In one case the patentee is restricting his liberty to use his own property,—viz., his patent: in the other he is exercising his lawful right to use or enjoy his patent.

The Government's Contention that, if the Leases in and by themselves were Lawful, they became Unlawful because Part of a General Scheme or Plan is not sound.

The government contends that, even if licenses containing restrictions of this character would in specific or isolated cases be lawful, when they are "but a part of one general scheme of combination, a conclusive and independent reason that the 'tying' clauses are not protected by the patent laws is found in *Standard Sanitary Mfg.* v. *U. S.*" (Government brief, p. 50).

We have shown above that the Standard Sanitary case has no bearing on the present case. In that case the elimination of competition did not result from the power of the patentee to enforce provisions to his advantage, due to the desire on the part of the manufacturers to obtain the benefit of his invention. On the contrary, the desire of the manufacturers was to eliminate competition, and they (not the patentee) suggested and accepted the restrictions contained in the licenses, not primarily because they could thus, and only thus, obtain the use of the patented invention, but because they hoped that thereby their illegal object might be attained under cover of a legal form.

It is doubtless true that acts which, regarded singly, are lawful may become unlawful if part of a broader, unlawful

scheme. But we submit that this principle is not applicable to the present case.

(*a*) An act lawful in itself may become unlawful if undertaken as one step in the accomplishment of an unlawful end. Thus the purchase of a pistol is lawful, but, if done in pursuance of a conspiracy to kill, it may be unlawful. But in the present case the end sought was the greater use of the defendants' patented machines and a greater return therefrom to the defendants. It was not unlawful, unless accomplished by unlawful means. But the means employed, namely, the imposition of restrictions on the use of patented machines, was lawful.

(*b*) Certain acts may be lawful, if done singly, which, if done in connection with other similar acts, may become unlawful, because, when such acts are considered together as a single transaction, their effect may be so much more far-reaching than the effect of a single act as to bring their combined effect within the prohibition of some rule of public policy. In the contracts considered in *United States* v. *Reading*, supra, the coal operators agreed to sell all their coal for all time to the railroads. Each of such contracts restrained trade, but possibly, if only a single contract had been made, the amount of restraint might have been negligible and the contract held lawful. But, when such contracts were made with the majority of independent mine owners, who controlled practically all the available independent coal supply, the restraint became material, in fact amounted to a complete prohibition against others engaging in the trade, and thus the contracts considered as one transaction were unlawful.

In our case, as we have shown above, if any restraint of trade resulted from the licenses, it was purely incidental to the exercise of lawful patent rights. Any consideration of public policy is, therefore, not relevant. The same is true of the entire series of licenses. As they were a lawful exercise of patent rights, the court is precluded from con-

sidering their legality from the point of view of public policy. The patentee can grant one license or many: it is his lawful and absolute right. This right is entirely different from the right to make a contract for a future supply of coal which is not an absolute right, but only a right which may be exercised to an extent not inconsistent with public policy.

These Restrictions are sustained by Numerous Decisions.

A great body of law has been built up which has approved and countenanced methods under which vast amounts of capital have been invested, businesses developed, and trade policies inaugurated based directly upon the rights of owners of patented articles to generally restrict their use by others in ways as far-reaching, and in some instances much more far-reaching, than those here charged.

Bement v. *National Harrow Co.*, 186 U. S. 70.
Victor Talking Machine Co. v. *The Fair*, 123 F. 424.
Cilley v. *United Shoe Machinery Co.*, supra.
Park v. *Hartman*, 153 F. 24.
Rubber Tire Wheel Co. v. *Rubber Works*, 154 F. 358.
Indiana Manufacturing Co. v. *Case Threshing Mch. Co.*, 154 F. 365.
U. S. Consolidated Co. v. *Griffin Co.*, 126 F. 364.
Goshen Rubber Works v. *Single Tire Co.*, 166 F. 431.
Otis Elevator Co. v. *Geiger*, 107 F. 131.
Heaton Pen. Co. v. *Eureka Co.*, 77 F. 288.
Rupp v. *Elliott*, 131 F. 730.
Dick Co. v. *Henry*, 149 F. 424.
Aeolian Co. v. *Juelg Co.*, 155 F. 119.

Crown Cork and Seal Cases, 172 F. 225, 174 F. 252.

Commercial Acetylene Co. v. *Autolux Co.*, 181 F. 387.

The Fair v. *Dover Mfg. Co.*, 166 F. 117.

New Jersey Co. v. *Schaefer*, 178 F. 276.

Edison Phonograph Co. v. *Kaufmann*, 105 F. 960.

Edison Phonograph Co. v. *Pike*, 116 F. 863.

National Phonograph Co. v. *Schlegel*, 128 F. 733.

New Jersey Patent Co. v. *Schaefer*, 144 F. 437.

Henry v. *Dick Co.*, 224 U. S. 1.

Columbian Wire Co. v. *Freeman Wire Co.*, 71 F. 302, 306.

Dickerson v. *Tinling*, 84 F. 192.

Bonsack Co. v. *Smith*, 70 F. 383.

Brodrick Copygraph Co. v. *Mayhew*, 131 F. 92.

In *Henry* v. *Dick Co.*, supra, this court said (p. 36):—

"That a violation of any such restriction annexed to a sale by one with notice constitutes an infringing use, has been decided by a great majority of the Circuit Courts and Circuit Courts of Appeals, and has come to be a well recognised principle in the patent law, in accordance with which vast transactions in respect to patented articles have been conducted. But it is now said that the numerous decisions by the lower courts have been erroneous in respect to the proper construction of the limit of the monopoly conferred by a patent, and that they should now be overruled. To these courts has been committed the duty of interpreting and administering the patent law. There is no power in this court to review their judgments, except upon a writ of certiorari, or to direct their decisions, save through a certified interrogotary for direction upon a question of law. This power to review by certiorari is one which has been seldom exercised in patent cases. A line of decisions, which has come to be something like a rule of property, under which large busi-

nesses have been conducted, should at least not be overruled except upon reasons so clear as to make any other construction of the patent law inadmissible."

The defendants have developed their business in accordance with methods and in reliance upon principles well recognized as proper under the patent law. They have only exercised rights which, according to numerous decisions of the courts, were granted them by that law.

We submit that their acts did not violate the Sherman Act, and that the judgment of the District Court should be affirmed.

THE GOVERNMENT'S BRIEF.

We have already shown that the government's brief is in large part not based upon the case presented by the record, but upon various erroneous assumptions and inferences, among others the following:—

1. That the entire case is before this court, whereas the fact is that merely the particular construction of the Sherman Act on which the District Court's decision was based is before this court.

2. That two of the three groups of defendants prior to the merger were in competition with each other to a limited extent (although it is admitted in several places in the government's brief that they did not compete), whereas the fact is that it is not alleged that the defendants were in competition with each other at all.

3. That the defendants manufactured all kinds of shoe machinery, whereas the fact is that there is no allegation in the indictment that the defendants manufactured all kinds of shoe machinery, and it is a matter of common knowledge that various machines which it is not alleged

were manufactured by the defendants are required in the manufacture of shoes.

4. That the three groups of defendants, prior to the merger, and the United Shoe Machinery Company, after the merger, controlled from 60 to 80 per cent. of the interstate trade in the four classes of shoe machinery mentioned in the indictment, whereas the fact is that there is no allegation in the indictment as to the percentage of interstate trade controlled by the defendants.

5. That the defendants were in competition with the so-called independents, whereas the fact is that there is no allegation in the indictment that they were in competition with the so-called independents.

6. That because of the merger alone a shoe manufacturer refusing to lease one kind of machine from the defendants could not obtain other kinds, whereas the fact is that the merger by itself neither produced nor tended to produce any such result.

7. That the lease restrictions required a shoe manufacturer leasing one or more kinds of the defendants' machines to use exclusively the defendants' machines and to use no machines manufactured by others, whereas the indictment only charges that a shoe manufacturer leasing one or more kinds of the defendants' machines was required to use some or all (that is only one, or at most two) other kinds out of a great variety of machines manufactured by the defendants.

While we point out these erroneous assumptions, we submit that, even based upon these assumptions, the government's argument is without merit.

The merger was a normal business development, neither directly producing nor tending to produce any restraint of trade, and was clearly lawful, and the leases, if material (which we submit they are not), were unobjectionable.

We believe that we have dealt sufficiently in the body of

our brief with the above questions and with the argument of the government.

We now only wish to call attention to one further point:—

The use made by the government of the alleged report of the Canadian Board of Investigation at pages 36 and 37 of its brief is most unjustifiable and unfair. Such board is not a court of record. The United Shoe Machinery Company of Canada is not the United Shoe Machinery Company mentioned in this indictment. The Canadian Act is not the same as the Sherman Act. Interstate commerce was not in question before that Board. The tying clauses described in that report are not the same as those charged in the indictment.

THE CRIMINAL APPEALS ACT OF 1907, UNDER WHICH THE PRESENT WRIT OF ERROR WAS BROUGHT, WAS REPEALED BY THE JUDICIAL CODE (CHAP. 231, ACTS OF CONGRESS 1911), AND FOR THIS REASON THIS COURT HAS NO JURISDICTION OF THE PRESENT CASE.

After writing the above brief a study of the recent new judicial code has convinced us that it repealed as of January 1, 1912, the Criminal Appeals Act of 1907 under which the present writ of error was attempted to be brought in March, 1912, from the District Court's decision rendered March 2, 1912 (Record, p. 73).

The Judicial Code purports to be a complete revision of all the laws relating to the Federal Judiciary. Its preamble is as follows:—

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress*

> *assembled,* That the laws relating to the judiciary be, and they hereby are, codified, revised, and amended, with title, chapters, head-notes, and sections, entitled, numbered, and to read as follows."

The Judicial Code, as is thus indicated by its caption, proceeds to cover in the greatest detail all matters relating to the Federal Judicial system. Section 236 of Chapter 10 of the Judicial Code provides as follows:—

> "The Supreme Court shall have appellate jurisdiction in the cases hereinafter specially provided for."

Sections 237 to 252, inclusive, thereupon proceed to enumerate the cases as to which the Supreme Court shall have appellate jurisdiction, and although other classes of cases are covered with the greatest minuteness, and the statutes relating thereto either re-enacted or modified, no reference whatsoever is made to cases which might be brought before the Court under the provisions of Chapter 2564 of the Laws of 1907.

The implication, therefore, is that it was intended to omit, and, by omitting, to repeal, the right to take a writ of error under the provisions of that Act. It is strengthened by the fact that in Section 238 of the Judicial Code the rights of appeal and writs of error directly from the District Courts to the Supreme Court are provided in other cases.

Chapter 14 (Sec. 297 *et sequitur*) of the Judicial Code proceeds to specifically repeal certain provisions of law theretofore in force relating to judicial matters. It does not specifically repeal or refer to Chapter 2564 of the Acts of 1907, which is the Criminal Appeals Act. The last clause of Section 297 of Chapter 14, however, contains the following language:—

> "Also all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are

> hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed."

The situation is analogous to that which arose subsequent to the passage of the Judiciary Act of March 3, 1891. That act also was intended to revise the laws relating to the Judiciary, to establish Federal Courts with powers and jurisdiction different from those theretofore existing, and to define and limit the appellate jurisdiction of the Supreme Court.

That act, too, specifically repealed certain provisions of previous acts relating to the question of appeals and writs of error, omitted specifically to repeal others, and contained a general clause repealing all other acts inconsistent with it. (Sec. 14, Act of March 3, 1891, U. S. Comp. Stat. 1901, p. 547.)

The Act of 1891, Section 5, provided:—

> "That appeals or writs of error may be taken from the District Courts or from the existing circuit courts direct to the Supreme Court in the following cases:"—certain specified cases.

Section 6 provided that all other appellate jurisdiction by appeal or writ of error, "unless otherwise provided by law," was in the Circuit Court of Appeals.

Section 14 provided that:—

> " . . . all acts, and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed."

Under this statute and this provision it was held that not only were sections of the preceding acts which were

specifically recited repealed, but also sections and acts not so specifically recited.

> *The Paquete Habana*, 175 U. S. 677.
> *McLish* v. *Roff*, 141 U. S. 661, 667.
> *Lau Ow Bew, Petitioner*, 144 U. S. 47.
> *Interstate Commerce Commission* v. *Atchison R.R. Co.*, 149 U. S. 264.
> *United States* v. *Rider*, 163 U. S. 132.

In the *Paquete Habana*, 175 U. S. p. 684, the court says:—

"Section 14 of the act of 1891, after specifically repealing section 691 of the Revised Statutes and section 3 of the act of February 16, 1875, further provides that 'all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act, are hereby repealed.' 26 Stat. 829, 830. The object of the specific repeal, as this court has declared, was to get rid of the pecuniary limit in the acts referred to. *McLish* v. *Roff*, 141 U. S. 661, 667. And, although neither section 692 nor section 695 of the Revised Statutes is repealed by name, yet, taking into consideration the general repealing clause, together with the affirmative provisions of the act, the case comes within the reason of the decision in an analogous case, in which this court said: 'The provisions relating to the subject-matter under consideration are, however, so comprehensive, as well as so variant from those of former acts, that we think the intention to substitute the one for the other is necessarily to be inferred and must prevail.' *Fisk* v. *Henarie*, 142 U. S. 459, 468.

"The decision of this court in the recent case of *United States* v. *Rider*, 163 U. S. 132, affords an important, if not controlling precedent. From the beginning of this century until the passage of the act of 1891, both in civil and in criminal cases, questions of law, upon which two judges of the Circuit Court were divided in opinion, might be certified by them to this

court for decision. Acts of: April 29, 1802, c. 31, § 6; 2 Stat. 159; June 1, 1872, c. 255, § 1; 17 Stat. 196; Rev. Stat. §§ 650–652, 693, 697; *Insurance Co.* v. *Dunham*, 11 Wall. 1, 21; *United States* v. *Sanges*, 144 U. S. 310, 320. But in *United States* v. *Rider*, it was adjudged by this court that the act of 1891 had superseded and repealed the earlier acts authorizing questions of law to be certified from the Circuit Court to this court; and the grounds of that adjudication sufficiently appear by the statement of the effect of the act of 1891 in two passages of the opinion: 'Appellate jurisdiction was given in all criminal cases by writ of error, either from this court or from the Circuit Court of Appeals, and in all civil cases by appeal or error, without regard to the amount in controversy, except as to appeals or writs of error to or from the Circuit Courts of Appeals in cases not made final, as specified in § 6.' 'It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose and its terms, the act of March 3, 1891, covers the whole subject-matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.' 163 U. S. 138–140."

"That judgment was thus rested upon two successive propositions: First, that the act of 1891 gives appellate jurisdiction, either to this court or to the Circuit Court of Appeals, in all criminal cases, and in all civil cases 'without regard to the amount in controversy.' Second, that the act, by its terms, its scope and its obvious purpose, 'furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.'"

"As was long ago said by Chief Justice Marshall, 'the spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.' *Durousseau* v. *United States*, 6 Cranch, 307, 314. And it is a well settled rule in the construction of statutes, often affirmed and applied by this court, that, 'even where two acts are

not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' *United States* v. *Tynen*, 11 Wall. 88, 92; *King* v. *Cornell*, 106 U. S. 395, 396; *Tracy* v. *Tuffly*, 134 U. S. 206, 223; *Fisk* v. *Henarie*, 142 U. S. 459, 468; *District of Columbia* v. *Hutton*, 143 U. S. 18, 27; *United States* v. *Healey*, 160 U. S. 136, 147."

"We are of opinion that the act of 1891, upon its face, read in the light of settled rules of statutory construction, and of the decisions of this court, clearly manifests the intention of Congress to cover the whole subject of the appellate jurisdiction from the District and Circuit Courts of the United States, so far as regards in what cases, as well as to what courts, appeals may be taken, and to supersede and repeal, to this extent, all the provisions of earlier acts of Congress, including those that imposed pecuniary limits upon such jurisdiction; and, as part of the new scheme, to confer upon this court jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the District Judge as to the importance of the particular case."

These decisions, which relate specifically to Acts of Congress defining the jurisdiction of the Courts, are merely a reiteration of the general rule that when a statute purports to cover an entire subject, earlier statutes are superseded.

Thus, this has been held with reference to tariff acts.

United States v. *Allen*, 163 U. S. 499–502.

And in reference to laws relating to the subject of assignments for the benefit of creditors.

Tracy v. *Tuffly*, 134 U. S. 206, 222–223.

The question is therefore practically reduced to the intended scope of the Judicial Code.

In this respect the act speaks most strongly for itself, but an investigation of the Congressional Record confirms the intrinsic evidence of the statute.

In the Senate the bill was in charge of Senator Heyburn. In the debates in the Senate all the parties seemed to take it as an undoubted fact that the act was intended to be entire and exclusive. As an example of the attitude taken by the senators in this matter, the following extract from a speech of Senator Bacon, delivered February 6, 1911 (Congressional Record 2137, Vol. 46, Part III.) is instructive:—

> "I am not willing, Mr. President, that a system of the judiciary which has lasted for one hundred twenty years, and about which there has been a complete adjudication of all their relative rights and powers, shall be stricken out without the most careful consideration, not simply by a committee but by the Senate itself. . . . I want to say to the Senator with the utmost seriousness, equally so with that which he expresses for himself, that if the alternative be presented between the proper consideration by the Senate of legislation which affects the whole body of Federal statutes, the serious and careful consideration of that, or, on the other hand, the refusal to enact it without such consideration, I would unhesitatingly vote for striking out all after the enacting clause."

A similar attitude is evidenced in the speeches delivered in the House of Representatives. Congressman Moon, who sponsored the bill in the House, made the following statements in a speech delivered December 7, 1910 (Congressional Record, Vol. 46, Part I. p. 84):—

> "Mr. Speaker, the bill presented to-day is a second installment of the great work of revision of the law which has been under consideration of this House for a number of years. . . .
>
> "The joint committee was empowered to revise and codify the laws and to recommend changes in existing law. In the performance of the work on the

bill it met during the recess of Congress and spent much time and labor in perfecting it. It searched through the Statutes at Large to collect the various acts relating to the judiciary, and the bill presented comprises many hundreds of pages scattered through numerous volumes of these statutes. *The work of examining, comparing, eliminating superfluous and repealed statutes, and codifying them into one concrete bill has been laborious, and this bill now before you for consideration represents the result of this completed work on this title.*" (Italics ours.)

Mr. Moon then goes on to trace the history of the judiciary acts of the United States from the date of the first judiciary act.

He also traces the history of this particular codification of law, showing that it originated with a bill introduced by Senator Hoar in 1899 (30 Statutes at Large, 1116). In accordance with Senator Hoar's bill a Commission was appointed.

The judicial code was the result of the labors of this Commission extending over a period of more than ten years. Any one who has read through the Congressional Records which contain the debates relating to this code cannot doubt but that the code was intended to constitute a single and exclusive body of law to cover the judiciary system of the United States.

Respectfully submitted,

FREDERICK P. FISH,
CHARLES F. CHOATE, Jr.,
MALCOLM DONALD,
Of Counsel for the Defendants.

UNITED STATES *v.* WINSLOW.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 620. Argued January 10, 1913.—Decided February 3, 1913.

On appeals under the Criminal Appeals Act of 1907 this court has no jurisdiction to review the interpretation of the indictment by the lower court, *United States* v. *Patten*, 226 U. S. 525, and if that court has construed the count as alleging a combination of a particular date to be in violation of the Sherman Law, without regard to subsequent acts, this court cannot pass upon the validity of those acts.

A combination for greater efficiency does not necessarily violate the Sherman Anti-trust Act.

Where each of several groups are carrying on a legal business of making patented machines which do not compete with each other, although the machines of all the groups are used by manufacturers of the same article, such as shoes, a combination of the several groups does not violate the Sherman Anti-trust Act.

Exclusion of competitors from making the patented article is of the very essence of the right conferred by the patent.

Where the share in interstate commerce does not appear in the record, and the machines in question are not alleged to be types of all the machines used in manufacturing the article for which they are made, the Government cannot claim that a specified proportion of the business was put into a single hand.

The disintegration aimed at by the Sherman Anti-trust Act does not extend to reducing all manufacture to isolated units of the lowest degree.

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, is a special provision and, as it is not mentioned in the repealing section of the Judicial Code of 1911 and is not superseded by any other regulation of the matter, it was not repealed by the Judicial Code. *United States, Petitioner*, 226 U. S. 420.

The District Court rightly held that the counts under review of the indictment against various persons for combining their businesses of

manufacturing patented machines for making different parts of shoes, and not competing with each other, did not constitute an offense under the Sherman Anti-trust Act.

195 Fed. Rep. 578, affirmed.

THE facts, which involve the construction of the Sherman Anti-trust Act, and determining whether the combination charged in an indictment thereunder of various manufacturers of patented shoe machinery constituted a violation thereof, are stated in the opinion.

The Solicitor General for the United States:

This case presents the question whether it is legal to gather together into one corporation about 80 per cent. of all the interstate trade in some particular line of activity when it is done gradually by legitimate methods and without any unfair competition such as characterized the *Tobacco* and *Standard Oil* cases. If that is legal, the sooner the business world understands it the better.

The indictment alleged that three separate groups of individuals (each controlling a different group of machines essential to the manufacture of shoes), combined together whereby their separate businesses were combined into onc under the joint management of these individuals; that each of the separate groups controls about 70 or 80 per cent of the interstate trade in the particular kind of machines manufactured by it; and that by the combination there were placed into one hand from 70 to 80 per cent of all the business in those kinds of shoe machinery manufactured by the defendants.

The constitutionality and sufficiency of the criminal provisions of the Sherman Anti-trust Act are settled. *United States* v. *Kissel*, 218 U. S. 601; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 401; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 69; *United States* v. *Swift*, 188 Fed. Rep. 92.

Individuals are subject to indictment for acts done under the guise of a corporation where the individuals personally so dominate and control the corporation as to immediately direct its action. *United States* v. *Swift*, 188 Fed. Rep. 92, 98; *United States* v. *McAndrews & Forbes Co.*, 149 Fed. Rep. 823; *Crall* v. *Commonwealth*, 103 Virginia, 855, 859, 860; *People* v. *Clark*, 8 N. Y. Crim. Rep. 179, 194, 195, 212; *People* v. *White Lead Works*, 82 Michigan, 471, 479; *People* v. *Duke*, 44 N. Y. Supp. 336, 337–339; *State* v. *Great Works &c. Co.*, 20 Maine, 41; *United States* v. *Durland*, 65 Fed. Rep. 408, 415; *S. C.*, 161 U. S. 306; *Balliet* v. *United States*, 129 Fed. Rep. 689; *Fitzsimmons* v. *United States*, 156 Fed. Rep. 477, 481; *Foster* v. *United States*, 178 Fed. Rep. 165, 173, 176–178; *La Societe Anonyme &c.* v. *Panhard Motor Co.* (1901), 2 Ch. 513, 516–517.

Prior to February 7, 1899, competition with reference to the different kinds of shoe machinery was so distributed between the different groups of defendants and the Independents that a shoe manufacturer had 24 different choices for obtaining shoe machinery.

By the organization of the United Shoe Machinery Company and the coalescence into one of the three groups of businesses formerly carried on separately by the defendants, the variety of choice open to a shoe manufacturer for obtaining the necessary shoe machinery was reduced from 24 ways to 16 ways.

The defendants then adopted what is known as the "tying" clause lease, which provided that any shoe manufacturer using any one class of machines furnished by the defendants should use for all his other machines only those furnished by the defendants; and that if he used any machine made by an Independent, the defendants would forfeit his lease and remove his machines. This form of lease immediately reduced from 16 to 2 the different ways by which a manufacturer could equip his factory, so that he had to get all his machinery from the defendants or get it all from the Independents.

The effect of the combination was to place from 70 to 80 per cent. of all the shoe machinery business (in so far as it related to those essential machines known as the lasting, welt-sewing, heeling and metallic fastening machines) into one hand. This combination into one group of four non-competitive businesses (which, taken together, constitute one complete business) curtailed the customer's liberty of action by compelling him to deal with one and the same group as to all four classes of machinery, whereas formerly he could deal with four separate groups. The question presented, then, is whether the combination into one group of 75 per cent. of the whole business of the country in a particular line is in such restraint of trade as to violate the Sherman law, it being conceded that the combination was not attended by any methods of unfair competition or illegitimate trade practices. Without attempting to determine exactly at what percentage of trade control a combination passes into the region of illegal restraint, the Government insists that when a combination acquires between 70 and 80 per cent. of the total trade in a particular business, the line between legal and illegal combinations has been passed; and that this is so even though the combination is made without resorting to any wrongful methods to coerce anyone to come into the combination. *Swift* v. *United States*, 196 U. S. 375; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *The Reading Co.*, 226 U. S. 324.

The adoption by the United Shoe Machinery Company of the "tying" clause lease whereby a customer was compelled to take all his machines from the defendants or all from the Independents was a direct restraint upon competition and trade (1) of the defendants by limiting their trade to those who would agree to use only the de-

fendants' machines; (2) of the customers by depriving them of the right to use some machines unless they would also use others, (3) of the Independents by preventing them from selling their machines to their former customers. *Montague* v. *Lowry*, 193 U. S. 38; *United States* v. *St. Louis Terminal*, 224 U. S. 383; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *The Reading Co.*, 226 U. S. 324.

The patent laws do not authorize the "tying" clause leases.

The precise point decided in *Henry* v. *Dick Co.*, 224 U. S. 1, was that a patentee might impose a restriction that his machine should be used only in connection with certain supplies which in point of fact bore so direct a relation to the invention that it could not be operated without their use in physical connection with the patented machine.

The doctrine of *Henry* v. *Dick Co.* should not be extended to permit a license restriction beyond the actual use of supplies in connection with the necessary physical operation of the patented machine. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20.

But even if the doctrine of *Henry* v. *Dick Co.* is extended to the extreme limit of permitting any kind of restriction upon the use of a patented machine, yet when such restrictions are a part of one general scheme of combination the patent laws no longer authorize such restrictions. The rights given by the patent laws do not give universal license against the positive prohibitions of the Sherman law, which is a limitation on all rights that might otherwise be pushed to evil consequences. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *The Reading Co.*, 226 U. S. 324.

The Criminal Appeals Act, 34 Stat. 1246, was not repealed by the adoption of the Judicial Code.

The defendant's right of appeal to the Supreme Court was given in the fifth and sixth sections of the Circuit Court of Appeals Act which, in the proposed revision of the laws of the United States, was placed in Chapter Ten on the "Supreme Court," in the title called "The Judiciary." The right of the *United States* to appeal to the Supreme Court was contained in the Criminal Appeals Act, which, in the same proposed revision was placed in Chapter Eighteen on "Procedure on Error and Appeal."

Congress, in passing the Judicial Code, did not attempt to cover the whole body of the revision submitted to it, but only adopted the first 14 chapters of the title "The Judiciary"; so that while it incorporated into the Judicial Code Chapter Ten on the "Supreme Court" giving the defendant a right to appeal, it did not attempt to cover any of the field embraced in the later chapters of the revision. Therefore, those subjects, *inter alia*, which were dealt with in proposed Chapter 18 were never even considered by Congress and therefore remained controlled by the former laws governing them—one of which was the Criminal Appeals Act. (Cf. Committee Report of 1907 of "Commission to Codify and Revise the Laws of the United States" and the Joint Committee of Congress' Revision of 1910. See Title XVI, "The Judiciary," Chapters 10 and 18.)

Mr. Frederick P. Fish and *Mr. Charles F. Choate, Jr.*, with whom *Mr. Malcolm Donald* and *Mr. William A. Sargent* were on the brief, for defendants in error:

Only a single question is presented by the case.

The lease question is not before this court, as hereinafter shown.

The fact that the machines manufactured by the United Shoe Machinery Company are protected by letters-patent was not considered by the District Court in its construction of the Sherman Act, and is not open in this court.

The facts alleged in the first and second counts are not brought out or are erroneously stated by the United States.

The second count is almost identical, word for word, with the first count, except as to the allegation in regard to interstate commerce, and changing the charge of combination of defendants' own trade into one of conspiracy to restrain the trade of shoe manufacturers in shoe machinery.

On this writ of error, the question is whether the District Court erred in the construction of the Anti-trust Act in sustaining the demurrers to counts one and two and so far as that act is construed by the District Court in its opinion relating to those two counts.

For construction of the Criminal Appeals Act as applied to the question before this court, see *United States* v. *Bitty*, 208 U. S. 393; *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Mason*, 213 U. S. 115; *United States* v. *Mescall*, 215 U. S. 26; *United States* v. *Stevenson*, 215 U. S. 190; *United States* v. *Kissel*, 218 U. S. 601; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Miller*, 223 U. S. 599.

The District Court decided the two counts now before this court were bad for duplicity in pleading, that is to say, on a question of general law not involving the construction of the Sherman Act, and that cannot be reviewed here. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Mason*, 213 U. S. 115; *United States* v. *Mescall*, 215 U. S. 26; *United States* v. *Stevenson*, 215 U. S. 190.

The District Court also held the two counts bad on a second ground, namely, that the original organization of the company was neither a combination in restraint of trade nor a conspiracy in restraint of trade under the Sherman Act. By such decision the District Court construed the Sherman Act.

The Criminal Appeals Act of 1907, under which the present writ of error was brought, was repealed by the

Judicial Code which became effective January 1, 1912, and therefore this court has no jurisdiction as the writ of error was filed after that date. *United States* v. *Stevenson*, 215 U. S. 190.

The fact that the machines manufactured by the company are protected by letters-patent was not considered by the District Court in its construction of the Sherman Act, and is not open in this court.

The District Court was not in error in its construction of the Sherman Act in relation to counts one and two.

The organization of the company by said defendants together, and the turning over by said groups of defendants to and the taking over by the company of the stocks and business of the three corporations, was not, and is not, a combination in restraint of defendants' own trade nor a conspiracy in restraint of trade of the shoe manufacturers in shoe machinery. *United States* v. *American Tobacco Co.*, 221 U. S. 106.

By the organization of the United Shoe Machinery Company there was no restriction of competition. The three groups of defendants, prior to the organization of the company, were not engaged in competition with each other. Their businesses were absolutely different, and each business related to a different commodity. *Kokomo Fence Machine Co.* v. *Kitselman*, 189 U. S. 8; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Northern Sec. Co.* v. *United States*, 193 U. S. 197; *Montague* v. *Lowry*, 193 U. S. 38; *Miles Medical Co.* v. *Park Co.*, 220 U. S. 373; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; *U. S. Machinery Co.* v. *La Chapelle*, 212 Massachusetts, 467; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *John Reardon Co.*, 191 Fed. Rep. 454; *Standard Sanitary Co.* v. *United States*, 226 U. S. 20; *United States* v. *Un. Pac. R. R. Co.*, 226 U. S. 61; *United States* v. *Terminal R. R. Ass'n*, 224 U. S. 383; *United States* v. *Reading Co.*, 226 U. S. 324.

By the organization of the company the defendants, taken individually, or in groups, or together, did not agree to restrain such trade as they had in different commodities, or in any manner to restrain their own trade. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Montague* v. *Lowry*, 193 U. S. 38; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; *Ellis* v. *Inman*, 131 Fed. Rep. 182; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Blount Mfg. Co.* v. *Yale Mfg. Co.*, 166 Fed. Rep. 555; *United States* v. *Trans-Missouri Ass'n*, 166 U. S. 290; *Swift & Co.* v. *United States*, 196 U. S. 375; *Miles Medical Co.* v. *Park Co.*, 220 U. S. 373; *United States* v. *Standard Sanitary Co.*, 191 Fed. Rep. 172; *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721.

The combination created by the organization of the United Shoe Machinery Company was purely an economic arrangement, not in violation of any rule in restraint of trade at common law, or which has been announced by the Supreme Court. *Joint Traffic Case*, 171 U. S. 505.

The combination of businesses, each dealing with a different commodity, into one corporation, has never been held a restraint of trade either at common law or under the Sherman Act. *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Reading Co.*, 226 U. S. 324; *Union Pacific Coal Co.* v. *United States*, 173 Fed. Rep. 737; *United States* v. *Standard Oil Co.*, 173 Fed. Rep. 177.

That the District Court was right in the only construction of the Sherman Act now before this court, to wit, in holding that the organization of the United Shoe Machinery Company was not within the purview of the Sherman Act, is further apparent from the fact that such organization of the United Shoe Machinery Company had no direct or immediate effect upon interstate commerce. If it had any effect at all upon interstate com-

merce, such effect was accidental, secondary, remote, and not even probable. *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721; *Anderson* v. *United States*, 171 U. S. 604; *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618; *Standard Oil Co.* v. *United States*, 221 U. S. 1.

Whether these lease provisions are or are not in restraint of trade is not before this court for several reasons: these defendants are not indicted for making these lease provisions; the language of the indictment in regard to these leases shows it; the act of the defendants in relation to these lease provisions is only an overt act, and only one of three or four overt acts named in the same paragraph of indictment; the combination and conspiracy are each absolutely complete without this overt act; the leases are not a part of the combination or conspiracy. No original intent to change leases is shown or any agreement to do so; the leases are not part of the original combination or conspiracy because between different parties; the question is one of duplicity on the theory of the United States; the lease provisions in these two counts were not construed or passed upon by the District Court; if the lease provisions had been involved here, the District Court would have considered the patent law.

The entire argument of the United States in regard to the business of these defendants and of the corporation is based on the erroneous view that the machines of the defendants were all the machines used in shoe making, and as a corollary to the above, the United States says that the defendants control between seventy and eighty per cent. of the entire shoe machinery business in the United States.

On this record the particular form of the organization of the company, and the taking over of the capital stocks and business of the three original corporations is immaterial.

Indictment 113 was dismissed by the District Court for

duplicity and it should be explained why the second count of indictment 114 was not brought to this court by the United States.

The defendants are not indicted for dominating the supply of shoe machinery. *Reading R. R. Case*, 226 U. S. 324.

The argument of the United States fails absolutely, because the defendants are not indicted for dominating the supply of shoe machinery; so also as to the alleged competition before the date of the organization of the company and the alleged competition thereafter.

The argument of the United States, as to the effect of the organization of the United Shoe Machinery Company, is absolutely fallacious.

The particular patented machines of these defendants are not indispensable to the manufacturer of shoes by the admission of the United States in its brief; in fact the dissatisfied shoe manufacturer mentioned by the United States is better off after the organization of this company than before.

The organization of the company did not compel the customer to deal with the same group as to the four classes of machinery. All of the cases cited by the United States in this section of its brief relate to combinations of competitors dealing in the same commodity.

It is to be remembered that defendants are not indicted for monopolizing; that defendants' machines are patented and they are entitled to one hundred per cent. of the trade therein.

The merger of the three companies was lawful and proper.

The leases form no part of the merger and are not pertinent to this discussion.

No express agreement to restrain trade is alleged, and, therefore, the Government is compelled to contend that the natural, necessary and inevitable effect of the merger was to restrain trade.

In every prior case, except *Loewe* v. *Lawlor*, 208 U. S. 274, the combination complained of has been a combination of competitors or a combination formed to eliminate competition.

As to the character of conduct condemned by the Sherman Act see *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Joint Traffic Asso.*, 171 U. S. 505; *Anderson* v. *United States*, 171 U. S. 604.

The merger did not produce, was not designed to produce, and its natural or necessary effect was not to produce any restraint of trade, for defendants were not personally restrained; defendants' business was not restrained; shoe manufacturers were not restrained; other shoe machinery manufacturers were not restrained.

The Government's contention that the shoe manufacturer's liberty of action was restrained because the number of concerns with which he could disagree was reduced, is unsound.

No greater power to restrain trade resulted from the merger, and if it could be held that any such power did result, it would not naturally or inevitably restrain trade.

No such power did result. If it did, the probability that it would produce a restraint of trade is too remote. *Swift & Co.* v. *United States*, 196 U. S. 375; *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267.

If any restraint of trade could result from the merger it would be purely incidental to the accomplishment of a lawful purpose. *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721; *Anderson* v. *United States*, 171 U. S. 604; *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Joint Traffic Asso.*, 171 U. S. 505.

The concentration of manufacturing at Beverly produced no restraint of trade.

The leases made by the defendants were clearly lawful

whether considered separately or in connection with the merger.

The general rule is that all restrictions imposed by patentees not in their very nature illegal are lawful. *Bement* v. *National Harrow Co.*, 186 U. S. 70.

Considerations of public policy not recognized in the patent law are irrelevant; the right to grant restricted licenses is given by the patent law. *Henry* v. *Dick Co.*, 224 U. S. 1.

This right, like other rights under the patent law, should be construed liberally. *Ames* v. *Howard*, 1 Sumner, 482; *Henry* v. *Dick Co.*, 224 U. S. 1.

If general considerations of public policy can be considered as relevant, the right to impose such restrictions should be favored.

The Sherman Act is not applicable to restrictions which are reasonable when considered with due regard for the patentee's lawful monopoly. *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Henry* v. *Dick Co.*, 224 U. S. 1; *Standard Sanitary Co.* v. *United States*, 226 U. S. 20.

The public have no right to have an unrestrained trade in or use of patented articles. *United States* v. *American Bell Tel. Co.*, 167 U. S. 224; *Park* v. *Hartmann*, 153 Fed. Rep. 24; *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. Rep. 358; *Cilley* v. *U. S. Machinery Co.*, 152 Fed. Rep. 726.

If trade is affected by reason of such conditions or restrictions imposed by patentees, such effect is incidental to the exercise of lawful rights, and therefore is itself lawful. The patentee's compensation need not be direct but may come from the sale or use of some other article. *Button-Fastener Case*, 77 Fed. Rep. 288; *Henry* v. *Dick Co.*, 224 U. S. 1.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to determine whether two counts in an indictment as construed by the District Court charge offences under the Sherman Act of July 2, 1890, c. 647. 26 Stat. 209. They were held bad, on demurrer, by the District Court. 195 Fed. Rep. 578. The two counts allege substantially the same facts; the first laying them as a combination in restraint of the trade of the defendants themselves, the second as a conspiracy in restraint of the trade of others, shoe manufacturers.

The facts alleged are as follows: For the last twenty-five years practically all the shoes worn in the United States have been made by the help of machines, grouped as lasting machines, welt-sewing machines and outsole-stitching machines, heeling machines and metallic fastening machines, there being a large variety of machines in each group. (These machines of course are not alleged to do all the work of making finished shoes.) There is a great number of shoe factories, and because the machines are expensive and the best of them patented, the manufacturers have had to get them principally from the defendants. Before and up to February 7, 1899, the defendants Winslow, Hurd and Brown, through the Consolidated and McKay Lasting Machine Company, under letters patent, made sixty per cent. of all the lasting machines made in the United States; the defendants Barbour and Howe, through the Goodyear Shoe Machinery Company, in like manner made eighty per cent. of all the welt-sewing machines and outsole-stitching machines, and ten per cent. of all the lasting machines; and the defendant Storrow, (against whom the indictment has been dismissed), through the McKay Shoe Manufacturing Company, made seventy per cent. of all the heeling machines and eighty per cent. of all the metallic fastening machines made in the United States. The defendants all were carrying on commerce among the States with such of the

shoe manufacturers as are outside Massachusetts, the State where the defendants made their machines.

On February 7, 1899, the three groups of defendants above named, up to that time separate, organized the United Shoe Machinery Company and turned over to that company the stocks and business of the several corporations that they respectively controlled. The new company now makes all the machines that had been made in different places, at a single new factory at Beverly, Massachusetts, and directly, or through subsidiary companies, carries on all the commerce among the States that had been carried on independently by the constituent companies before. The defendants have ceased to sell shoe machinery to the shoe manufacturers. Instead, they only let machines, and on the condition that unless the shoe manufacturers use only machines of the kinds mentioned furnished by the defendants, or if they use any such machines furnished by other machinery makers, then all machines let by the defendants shall be taken away. This condition they constantly have enforced. The defendants are alleged to have done the acts recited with intent unreasonably to extend their monopolies, rights and control over commerce among the States; to enhance the value of the same at the expense of the public, and to discourage others from inventing and manufacturing machines for the work done by those of the defendants. The organization of the new company and the turning over of the stocks and business to it are alleged to constitute a breach of the Sherman Act.

It is to be observed that the conditions now inserted in the leases are not alleged to have been contemporaneous with the combination, or to have been contemplated when it was made. The District Court construed the indictment as confined to the combination of February 7, that is, simply to the merger of the companies without regard to the leases subsequently made, 195 Fed. Rep. 592, 594;

and we have no jurisdiction to review this interpretation of the indictment. *United States* v. *Patten*, 226 U. S. 525. Hence the only question before us is whether that combination taken by itself was within the penalties of the Sherman Act. The validity of the leases or of a combination contemplating them cannot be passed upon in this case.

Thus limited the question does not require lengthy discussion, and a large part of the argument addressed to us concerned matters not open here. On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent Case*, 210 U. S. 405, 429, and it may be assumed that the success of the several groups was due to their patents having been the best. As, by the interpretation of the indictment below, 195 Fed. Rep. 591, and by the admission in argument before us, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. It is said that from seventy to eighty per cent. of all the shoe machinery business was put into a single hand. This is inaccurate, since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendants' share in commerce among the States does not appear. But taking it as true we can see no greater objection to one corporation manufacturing seventy per cent. of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree.

It is as lawful for one corporation to make every part of a steam engine and to put the machine together as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt. See *Virtue* v. *Creamery Package Manufacturing Co., ante*, p. 8. *Swift & Co.* v. *United States*, 196 U. S. 375, 396.

It was argued as an afterthought that the act of March 2, 1907, c. 2564, 34 Stat. 1246, under which the United States took this writ of error, was repealed by the Judicial Code of March 3, 1911, c. 231. 36 Stat. 1087, 1168. But it is not mentioned among the statutes expressly repealed by § 297 of the latter act, it is not superseded by any other regulations of the matter, it is a special provision, and on principles similar to those discussed in *Ex parte United States, Petitioner*, 226 U. S. 420, it must be held not to have been repealed. See further *Johnson* v. *United States*, 225 U. S. 405, 419; *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497.

Judgment affirmed.